92-309

Supreme Court, U.S.
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No. ______

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

L. OBIOMA AHAM-NEZE,
Petitioner,

v.

SOHIO SUPPLY COMPANY, ADDAX OVERSEAS S.A. OF PANAMA, PALIME NAVIGATION COMPANY, RICE UNRUH,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

*L. OBIOMA AHAM-NEZE, Esq.
FOREMAN, DEGUERIN & NUGENT
909 Fannin, Suite 590
Houston, Texas 77010
(713) 655-9000

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred and abused its discretion in ruling that Petitioner's Rule 60(b) F.R.C.P. Motion to Vacate Judgment for "fraud upon the Court," made three months after the Court's decision, was "filed way out of time"?

2. Whether the conduct of co-counsel herein in surreptiously filing a brief behind the back of Petitioner, constitutes a "fraud upon the Court"?

3. Whether the Court below erred and abused its discretion when it completely overlooked and/or improperly minimized as "totally frivolous," Petitioner's factual basis for the Motion to Vacate Judgment in this case for "fraud upon the Court"?

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IN THE

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OCTOBER TERM, 1992

L. OBIOMA AHAM-NEZE,

Petitioner,

v.

SOHIO SUPPLY COMPANY, ADDAX OVERSEA
S.A. OF PANAMA, PALIME NAVIGATION COMPANY,
RICE UNRUH,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

COMES NOW L. OBIOMA AHAM-NEZE, Petitioner in the above styled and captioned cause, and respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the THIRD CIRCUIT entered on May 20, 1992, denying Petitioner's motion to vacate judgment in this cause for "fraud upon the court."

OPINION BELOW

On May 20, 1992, two days after this Honorable Court denied Certiorari in Cause No. 91-1547, the Court of Appeals for the Third Circuit (Honorable Nygaard, presiding) issued an order summarily dismissing Petitioner's motion to vacate its judgment of December 19, 1991, made pursuant to Rule 60(b) of Federal Rules of Civil Procedure, for "fraud upon the

Court." The Court below ruled that the motion was "filed way out of time," and secondly, "totally frivolous." [A copy of the Order of the May 20, 1992 is attached herein as Appendix "A".][1]

JURISDICTION

The order of the Court of Appeals *Sub judice* was entered on May 20, 1992 [Appx. "A" at 2a]. Jurisdiction of that Court was pursuant to Title 28, United States Code Section 1291. Further, the Court of Appeals retained ancillary jurisdiction to review whether its judgment was obtained by fraud pursuant to Rule 60(b) of Federal Rules of Civil Procedure and also under the Authority of *Hazel-Atlas Glass Co. v. Hartford Co.*, 322 U.S. 238,64 S.Ct. 997, 88 L.Ed. 1250 (1944).

Jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1254(1), and in the alternative, pursuant to the common-law All Writs Statute under Title 28, United States Code, Section 1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property without due process of law. . .

Federal Rules of Civil Procedure, Rule 60(b)(6):

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

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[1] No other petitioner is involved in this petition.

> (6) any other reason justifying relief from the operation of the judgment. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, *or to set aside a judgment for fraud upon the court.*

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition

On April 27, 1990, the District Court (Bechtle, C.J., presiding) entered an order sanctioning this petitioner, his co-counsel, Simon W. Tache, Esq. and Plaintiff, CTC Imports and Exports, Houston. (The opinion of the district court was published as *CTC Imports & Exports v. Nigerian Petroleum Corporation*, 739 F.Supp. 966 (E.D. Pa. 1990). On November 27, 1990, co-counsel purportedly gave a notice of appeal on behalf of all three parties sanctioned. On December 19, 1991, the Court of Appeals for the Third Circuit (per Nygaard, J.) issued an opinion wherein it ruled that petitioner was not an appellant because the notice of appeal given by his co-counsel, Tache, failed to name him in his individual capacity. The Court below affirmed the sanction imposed on CTC, but vacated the sanction imposed on Petitioner's co-counsel, Tache. (The opinion of the Court of Appeals was published at 951 F.2d 573 (3rd Cir. 1991).

By a timely petition for rehearing and suggestion *en banc*, Petitioner appealed the Court of Appeals' ruling. Rehearing was denied by an order *en banc* dated January 17, 1992.

On February 24, 1992, Petitioner applied for a Writ of Certiorari appealing the ruling regarding the defective notice of appeal. In the process of preparation for that writ, Petitioner went back and reread the Court of Appeals' opinion. That rereading revealed three things: First, that co-counsel, Tache, had surreptitiously filed a brief in this case, behind the back of this Petitioner, contrary to his representation to this petitioner that he would not be filing one.

Second, that the secret brief which Mr. Tache deliberately failed to serve on this Petitioner,was filed with the express purpose of materially altering and substantially distorting, the facts of Plaintiff's case as he knew them, with the intent and calculated design of influencing the Court of Appeals' process and decision, in order to relieve him of the sanctions imposed on him, while retaining the sanctions imposed on Petitioner and Plaintiff. In fact, Tache's secret brief had precisely the intended effect; for the Court of Appeals relied on the misrepresentations and made its ruling on this basis.

Third, that as far as Petitioner's interest is concerned, the secret brief merely confirmed Petitioner's allegation that the defective notice of appeal given on his behalf by Mr. Tache was part of an overall cruel and calculated scheme (designed the moment he was given the opportunity to give the notice of appeal on behalf of the parties) to deny this Petitioner access before the Court of Appeals.

As a direct result of Mr. Tache's secret brief and the intentional misrepresentation of the facts therein, the case before the Court of Appeals turned on what Petitioner and Plaintiff did or did not tell Mr. Tache, and that led the Court of Appeals to find the following "facts":

> The most damaging facts are attributable to CTC and perhaps Aham, but not to Tache. At the time of filing Tache was not in a

> position to know or obtain vital facts. Tache had no reason to suspect CTC's documents were forged. He had never worked for CTC before this matter. He did not know about the fraudulent M/V BARBRO transaction. The ICC investigator did not contact him nor had he any reason to know of the maritime inquiry unless CTC informed him. It did not. Thus, the District Court erred as a matter of law when it imputed knowledge of the information Tache could not have reasonably obtained and liability for not acting on this knowledge. *See CTC Imports and Exports v. Nigerian Petroleum,* 951 F.2d 573, 579 (3rd Cir. 1991).

As a real party in interest, as the referring attorney and as attorney for Plaintiff, Petitioner had no way nor the opportunity to address or rebut these intentional misrepresentations since Tache's brief was not available to him until after jurisdiction in the Court of Appeals had lapsed. What Petitioner as referring attorney did or did not tell Mr. Tache was never at issue in the District Court and was not anticipated to be an issue in the Court of Appeals, since Mr. Tache had originally joined in preparing Plaintiff's brief. Unbeknownst to this Petitioner, however, the secret brief made it the primary issue in this case.

The first time Petitioner was able to bring the fact of the secret brief to the attention of any court, albeit with little or no attached evidence, was on the first petition for Writ of Certiorari filed before this Court on February 24, 1992.

In that Writ, Petitioner notified this Honorable Court of his contemporaneous motion in the Court of Appeals to vacate judgment in this case for "fraud upon the court" (see Petitioner's brief on Writ of

Cert. in Cause No. 91-1547 at 12 n.6). The Motion to Vacate was filed before the Third Circuit on April 7, 1992. (That Motion is attached herein, as Appendix "C" at 5a).

On May 18, 1992, this Honorable Court denied Certiorari. By an order dated May 20, 1992, barely two days after Certiorari was denied, the Third Circuit, without *any* investigation or hearing as to whether it was an unwitting victim of fraud perpetrated by an officer of its court, summarily dismissed Petitioner's motion as having been made "way out of time," and regrettably labelled it "totally frivolous." [See Appx. "A" at 2a]

It is respectfully submitted, that the Order of the Court of Appeals stating that Petitioner's motion to vacate judgment for "fraud upon the court" was filed "way out of time", represents an incorrect statement of the law and a total misapplication of the legal standard governing the time frame for motions made pursuant to to Rule 60(b) of F.R.C.P., and under the authority of *Hazel-Atlas glass Co. v. Hartford Empire Co.*, Supra, and its progeny.

It is further the submitted, that in completely overlooking or improperly minimizing the factual basis presented in Petitioner's motion as "totally frivolous," without the benefit of any foundation, investigation or hearing (for most of the materials presented in the motion were events which transpired between two co-counsels, and which the Court below was not in position to know without proper hearing), the Court below's ruling contravened the mandatory hearing and investigation requirement of *Hazel-Atlas*.

Following the Court of Appeals' Order of May 20, 1992, Mandate issued in this cause on May 22, 1992.

Petitioner promptly filed a Motion to Recall Mandate. That Motion was denied on June 24, 1992.

Shortly thereafter, Respondents moved the district court for an order molding the judgment of the Court of Appeals. Petitioner noticed the Respondents regarding his intention to take the deposition of witnesses who can corroborate some of the facts stated in Petitioner's Motion to Vacate.[2] The Respondents promptly filed an emergency motion for protective order which was granted without hearing. Judgment was entered on August 3, 1992. [See Appendix "S"][3] Petitioner filed a Motion to Stay Execution of that Order on August 17, 1992, pending the decision of this Honorable Court.

B. Statement Of Relevant Facts.

The source of the findings of the Court of Appeals stated above, which incidentally is not found anywhere else in the record except in Mr. Tache's brief (Attached herein as Appendix "R" at 131a), are these:

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[2] One key witness, Mr. Cecil Roy Riley, with whom Petitioner stayed while preparing the CTC brief, and who read all the drafts of the brief when it had Mr. Tache's name on it, was unavailable to Petitioner until now. Mr. Riley had moved abroad to Jamaica in September of 1991 and came back to the United States for a visit in late July of this year. [Mr. Riley's affidavit is attached herein as Appendix "E" at 30a]

[3] By that judgment, Petitioner is now liable for $137,054.06 and Plaintiff CTC, $167,178.12 in sanctions. [See Appx. "S"] Petitioner's co-counsel whose careful, deliberate and conscious scheme to deceive the Court of Appeals by surreptitiously filing a brief that altered the entire facts of the case, contrary to his own admission that Plaintiff's account of the facts was truthful, (See page 2 of Tache's letter to Baldus, Appx. "I" at 42a), on the other hand, received a favorable ruling. Not only is he not liable for sanctions, he is also entitled to collect whatever amount expended in resisting sanctions. What justice?

At page X. of his statement of facts, Tache states:

> At no time during this period was Appellant, Simon W. Tache ever advised of Plaintiff's involvement in any fraudulent transaction, nor was this Appellant aware that the Plaintiff had been warned that his documents may be forged. While the other Defendants purported to lay claim to the cargo aboard the "Vytina", at no point during this time did any of them produce any authentic document or documentation to substantiate their claim of the cargo aboard the "Vytina."

[Appx. "R" at 136a]

Tache continued:

> My decision to terminate my involvement in the representation of the Plaintiff (which by the way came not in March or April of 1989, but in late November of that year) was not an indication of a belief in the fraudulent nature of Plaintiff's documentation, but rather on the professional conclusion that at the very least, Plaintiff's title had been tainted. Thus, it was professionally and practically impossible for me to continue to represent the Plaintiff, even if the Defendant's title was also defective.

[*A*ppx. "R" at 136a] (Parenthetical comment Petitioner's).

Further, on page 9 of his secret brief, Mr. Tache stated the following:

> The conclusion by the lower court that the Plaintiff had been advised by the International Chamber of Commerce investigator that his documents were forgeries prior to

> the filing of the complaint and the arrest of the vessel, *assumes that the Plaintiff communicated this information to counsel. On the contrary, this information was never communicated to the Appellant at any time prior to the filing of the complaint and arrest of the vessel. Similarly, Appellant had no knowledge prior to March 16, 1989, or five days after the filing of the complaint that the Plaintiff had been involved in a similar oil transaction.* [Appx. "R" at 146a] [Emphasis Petitioner's].

In the very next paragraph, Tache adopted Petitioner's account of pre-filing investigative which, of course, included the above information he claimed was never communicated to him:

> In light of these facts, it was error for the court to conclude that Appellant's pre-filing inquiries was "woefully inadequate" (*See the Statement of Facts in the brief of Appellants CTC and L.O. Aham, Esquire for a detailed description of the pre-filing investigation.*) [Appx "R" at 146a] (Emphasis Petitioner's)

But compare all the above with Tache's statement on his Summary of Arguments. For example:

> It was clear that the vessel, which by its own documents and all documents produced was scheduled to arrive in the Gulf Coast had been diverted to Philadelphia without the knowledge of the Plaintiff. It was also clear that the car was diverted to Philadelphia by someone without the Plaintiff's knowledge. It was also clear that the extent the Plaintiff did not know the reasons behind the diversion, that he may have been the victim

> of a fraud. Even if the cargo aboard the "Vytina" had been sold to some other persons as well as the Plaintiff, it was clear to this Appellant that Plaintiff was part owner of that cargo. Therefore, as a matter of law, the Plaintiff various theories, *supportable by the facts*, including breach of contract, fraudulent conveyance and disputed title over cargo. Factually, undersigned Appellant had in *his possession documents from both the referring counsel and the Plaintiff which were sufficient under any legal theory to convey title to the Plaintiff.*[4] [Appx. "R" at 138a]

However, contrast the foregoing position from his conclusion below and it will be manifestly evident why Mr. Tache did not want his brief in the hands of this Petitioner:

> It was clear error for the lower court to have imposed such severe sanctions without giving Appellant [Tache] the opportunity to be heard. In fact, if the Plaintiff, Mr. Aham and the Appellant had been interrogated by the lower court, the Appellant's role would have become Apparent and visciate any doubts that Appellant did not violate Rule 11.

(Tache's Brief at 14, Appx. "R" at 151a)

Honorable Justices, it is respectfully submitted, that no self-respecting lawyer regardless of age or experience, would receive such a brief containing a statement such as has been presented above and let it go unanswered, or continue to try to present a joint or united front. More than anything the Respondents' brief could have thrown at the Appellants, Mr. Tache's brief in effect destroyed unjustly and maliciously, Plaintiff's theories of defense and Petitioner's valiant and honest effort to put them together.

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[4] These documents included copies of the original documents from the M/T "Barbro" handed to him personally by Petitioner on March 14, 1989, *two* days prior to the date he claimed he found out about the "Barbro" transaction. (See Tache's Brief, at 9, Appx. "R" at 146a), and six days from the date he was actually informed of these facts.

The issue of a previously failed shipment (carried on the M/T "Barbro") that Plaintiff was involved in, for example, was mentioned by this Petitioner personally, the first night Petitioner referred the matter to Mr. Tache. We discussed at length whether or not that failed shipment could be construed against Plaintiff as notice, but decided in our professional judgments that it would not because when Plaintiff confronted his shippers in Nigeria about the failed shipment, he was told to come back and get another shipment as a REPLACEMENT of his cargo at NO FURTHER COST OR EXPENSE. (See Petitioner's and CTC's Brief, Appx. "Q" at 97a)[5]

Viewed as a replacement cargo, which was what Plaintiff communicated to Petitioner, and Petitioner to Tache, then Plaintiff did not foolishly head back to Nigeria to be defrauded a *second time.* He simply tried to recoup what was already promised him. But when this second shipment proved fruitless as the first, he then had concrete information about the intention of his shippers and thus took prompt action to arrest the vessel when nobody would help him verify proper title.[6]

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[5] This fact was aired during Plaintiff's deposition which Mr. Tache helped him prepare for. It was also noted in the Statement of Facts in my brief which Mr. Tache has cited with approval. Further, Petitioner was *present* when Mr. Tache prepared Plaintiff for deposition, twice. Petitioner stated in his motion that if Tache can produce his notes without tampering, it would be evident that he knew of the information he now denies.

Mr. Tache reference to pre-filing inquiries demonstrated that he adopted Petitioner's account of what transpired in Statement of Facts. (See Tache's Brief, Appx. R at 146a)

Further, Petitioner argued in his Motion that even assuming *arguendo* that Tache was not told anything about the first failed shipment, the moment he heard the word "replacement cargo", what happened the *first time* would have been the next inquiry any one in his position would have made. Petitioner stated that even if he did not see it fit to inquire, Petitioner told him anyway. [Appx. "C" at 9a] Besides, he could have taken a number of measures like commenting on the record that it was the first time he was hearing about them or he could have even resigned as counsel. He did none of these things.[7]

Not informing Mr. Tache, it is submitted, would have been fatal to the case. It would have conferred or distorted the issue of notice since Plaintiff was going against the same Sohio Supply Co. he had dealt with in the first failed shipment of "Barbro." In a situation where the defense already had all the information, how can a Plaintiff or referring counsel withhold those information from co-counsel and still expect to win?

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[6] Plaintiff's contact with International Chamber of Commerce was a highly controversial one. The CTC's brief dealt exhaustively with that point. Mr. Tache was informed also about this and reached the same conclusion as Petitioner. (See Petitioner's Brief attached herein as Appx. "Q," at 90-91a)

[7] His resignation did not come until November 1989. Even at that, it was because Plaintiff failed to comply with his financial obligations, rather than for any other purpose stated in Mr. Tache's brief.

The serious harm with Mr. Tache's misrepresentation in his secret brief, it is respectfully submitted, is that it presented the Court below with two sets of facts on Plaintiff's side. The Court of Appeal then labored under the mistaken but understandable assumption that Petitioner also got Mr. Tache's brief and must have acquiesced in the facts contained therein since he did not object.

No Opportunity To Rebut Materials In Tache's Secret Brief

By making what Petitioner and Plaintiff did or did not tell Mr. Tache, the corner stone of its decision, that opened the door for Petitioner to rebut or answer those allegations. But since Petitioner as a real party in interest and as attorney for Plaintiff did not receive Mr. Tache's brief nor was alerted to it during the oral argument, there was no real opportunity to adequately rebut co-counsel's allegations. Consequently, neither Petitioner nor Plaintiff had his day in Court.

Because the affirmation of sanctions turned on these facts, and because these facts also revealed a larger scheme or grand design by co-counsel to defeat, by way of a purposefully filed defective Notice of Appeal, and thus foreclosing Petitioner's access to appeal, Mr. Tache perpetrated fraud upon the Court of Appeals.

Materials Presented In Support Of Petitioner's Motion To Vacate

1. Sworn Declarations

Petitioner presented his own and other sworn declarations under oath and penalty of perjury, that Mr. Tache's brief was never served on him by any means that could be deemed appropriate method of service, whether by "hand delivery" as service in this case was purported to have been effected, or by any form of mail service. [See Petitioner's Affidavit attached herein as Appendix "D" at 22-23a]. [See also Affidavits of Messrs. Jack C. Schiefen and Wolfgang E. Behrens attached herein respectively as Appendices "G" at 36a and "H" at 39a].[8]

Petitioner gave a detailed account in that affidavit of how the brief on behalf of CTC and himself was filed. That brief was originally written on behalf of all three parties. Mr. Tache reneged from it on the last possible moment on the day it was due to be filed on January 22, 1991. The affidavit of Mr. Cecil Roy Riley, attached herein in lieu of a deposition because of a protective order, corroborates some of the facts contained in Petitioner's affidavit. Besides these affidavits, Petitioner presented some objective facts in support of his motion to vacate.

1. Evidence of Prior Modus Operandi

Petitioner showed that the filing of a surreptitious brief was consistent with Tache's *modus operandi*, and that he had in fact filed and signed Petitioner's signature on numerous motions previously, without prior consultation, approval or authorization by Petitioner. Indeed the response to the Motion for Sanctions, (Attached herein as Appx. "N"at 49a) is a case in point. That motion was made when Petitioner was injured and nursing a reconstructive knee surgery in Houston. Even the District Court and the Respondents caught on to this. On footnote 1 of its decision, for example, District Court wrote:

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[8] Petitioner also attached the affidavit of a former employee and client of Mr. Tache, Ms. Bernadette A. White, now Mrs. Aham-Neze. This affidavit was so fact sensitive in that it provided the crucial missing link in Petitioner's attempt to show that Mr. Tache knew what he was doing and that this was indeed a calculated design on his part to deny Petitioner his day in Court and to pervade the course of justice. (See Appx. "F," at 33a). This Affidavit speaks for itself. While Petitioner is aware of the potential for bias here, whatever concern the Court may have had, could have been cured by cross-examination.

> Although Mr. Aham signed Plaintiff's memorandum of law in repsonse to Defendants' Motion for Sanctions, there is no discussion or defense of his role as attorney for Plaintiff.

(Opinion of the District Court, 739 F. Supp. 966, 970 n.1)

The Respondents themselves wrote in their Reply Memorandum to that motion:

> The answering brief filed is captioned "Plaintiff's Answer to Defendants Motion for Sanctions." However, the brief is in essence a rebuttal apparently on the behalf of the Philadelphia counsel for Plaintiff, Simon Tache and there does not appear to be any specific position set forth concerning conduct of the Plaintiff and its other counsel, L.O. Aham, although Mr. Aham signed the brief. As such, Sohio avers that there is no opposition to the Motion and therefore the Motion should be granted as against L.O. Aham and the Plaintiff as being without opposition.

[See Appx. "O" at 61a]

While Petitioner was relatively new to the practice of law at that time, it is almost inconceivable that any lawyer would have agreed to sign any such document without setting forth his own position. Petitioner found out about these motions after the Respondents sent him their reply. This response to Motion for Sanctions was only one of many motions which originated from Mr. Tache's office without Petitioner's prior approval. [See Petitioner's affidavit in Support of Motion to Vacate, Appx. "C" at 25a]

3. The So-called "Most Damaging Facts" Not Supported By Record, Appeared First Time In Tache's Secret Brief.

Petitioner drew the attention of the Court of Appeals to the fact that the so-called "Most damaging facts" found by the Court below was never mentioned in any previous documents filed independently by Mr. Tache. The first time Mr. Tache told any court that he was never alerted to the International Chamber of Commerce's warning, nor was he told of a previous failed shipment Plaintiff was involved in, was in his secret appeals brief which was not served on this Petitioner. [See Appx. "C" at 10a] The importance of not having presented these "facts" before it appeared in his brief cannot in anyway be minimized. These misrepresented "facts" are so crucial that no reasonable attorney in Mr. Tache's position, confronted as he was, with possibility of severe sanctions to the tune of $167,178.12, would have omitted bringing to the attention of the Court at the earliest opportunity, those crucial facts withheld from him.

4. Tache Had Several Opportunities Before His Brief To Present "Facts" He Claims Not Revealed To Him.

His first opportunity came on April 14, 1989 in the form of "Plaintiff's Answer to Defendant's Motion for Sanction." [Appx. "N" at 49a] This Motion, as was previously stated, though bearing Petitioner's signature, Petitioner had nothing to do with its formulation.

Mr. Tache's second opportunity came in June 1990 in the form of a "Motion for Reconsideration," again filed independently when Petitioner was abroad. [See Appx. "P" at 63a]

There was no mention in that motion that Petitioner or Plaintiff failed to tell him anything. Tache's third opportunity came in the form of a proposed but unsigned "affidavit" [See Appx. "M" at 47a] which he presented to this Petitioner. Petitioner did not sign it because it contained nothing but inaccuracies of what had transpired. But more importantly, that affidavit which he himself proposed, again failed to mention that Petitioner withheld anything from him.

Tache's fourth and fifth opportunities came in the form of Petitioner's own Motion for Reconsideration and Brief of CTC and Petitioner, wherein Petitioner stated unequivocally that every information available to the Petitioner was disclosed to Mr. Tache. (See, e.g., Appx. "Q" at 93a). Tache never officially rebutted any fact stated therein.

In fact, his own letter of February 7, 1991 to Mr. Bradford Baldus, Esquire of The Third Circuit Clerk's Office, was written after he had filed his own brief.

In it Tache wrote:

> . . .Accordingly, it is requested that this Honorable Court allow the appeal in this matter to be docketed as to all three of these parties, and accept for filing the Brief of CTC Imports and Exports and L. Obioma Aham, Esquire. *The factual developments in Mr. Aham's Brief provides the Court with the information it needs to fairly consider the appeal on the merits.* [*See* Appendix "I" at 42a) (This emphasis Petitioner's).

Moreover, just as importantly, Mr. Tache drafted and joined himself in Petitioner's Motion to enlarge content of the original brief filed before the court of appeals. [See Appendix "J" at 43a]. Despite these adoptions and admissions, Mr. Tache's rendition of the facts in his brief, as has been shown above, completely and directly contradicted Petitioner's account.

Is there any wonder why that brief was intended not to reach this Petitioner? It is respectfully submitted that, if there is any inconsistencies in Plaintiff's account of what transpired in the case, the benefit of doubt here does not belongs to Tache who has spoken with a forked tongue, Petitioner and CTC deserved that benefit.

5. Tache's Secret Brief Corroborates Petitioner's Allegation Of Fraud

Lastly, Tache's statement of issues in his brief provide ample corroboration of Petitioner's allegation. (See Appx. "R" at 131-132a) While his statement of issues mentioned Petioner's name, the body of the brief itself failed to address those issues, suggesting evidence of hurried work. Indeed, the statement of the issues as presented in Tache's brief was in response to Petitioner's request that Tache come up with the issues he thinks should be dealt with. It was Petitioner's practice to solicit Tache's commentaries before putting together any brief. However, it was decided that we should should stick to the issues used in Petitioner's Motion for Reconsideration. Petitioner's letter of August 19, 1991 (Attached herein as Appendix "L" at 46a), written in response to the Third Circuit call for Letter brief on Rule 60(b) and obviously well before its decision on December 19, 1991, corroborates this point.

Further, Petitioner pointed out to the Court of Appeals that the exhaustive treatment given to Rule 11 which Petitioner was not even charged with (Petitioner was only charged with violating 28 U.S.C. § 1927), would have been unnecessary had he known that Tache intended to do a separate brief. The necessity of such exhaustive treatment of Rule 11 was because of Tache's participation in the joint brief. Moreover, if Petitioner had known that Mr. Tache was going to do a separate brief, it certainaly would have made no sense at all to travel all the way from Houston to Philadelphia to write a brief on behalf of two parties both of whom reside in Houston.

For these reasons, it is respectfully submitted, that the Court below erred and abused its discretion in holding that Petitioner's Motion to Vacate for "fraud upon the court" was made out of "way out of time" and "totally frivolous." The legal basis for this petition is set forth below.

REASON FOR GRANTING THE WRIT

THERE ARE SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS ERRED AND MISAPPLIED THE LAW WHEN IT IMPROPERLY RULED THAT A RULE 60(b) OF F.R.C.P. MOTION TO VACATE JUDGMENT FOR "FRAUD UPON THE COURT", MADE BARELY THREE MONTHS AFTER DISCOVERY OF THE FRAUD AND TERMINATION OF THE PROCEEDINGS IN THE COURT OF APPEALS, WAS FILED "WAY OUT OF TIME".

It is well established that an order denying Motion under Rule 60((b) is final and appealable, although it permits the appellate court review only of the question whether the Court below abused its discretion in ruling on the Motion. *Bowder v. Director, Dept. Corrections of Illinois*, 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed 2d 521 (1978). *See also Harrison v. Byrd*, 765 F.2d 501,503 (5th Cir. 1985) (quoting Wright and Miller, 11 FEDERAL PRACTICE AND PROCEDURES § 2871, at 257-259).

The inherent power of a federal court to investigate a judgment that has been obtained by "fraud upon the court", this Honorable Court has stated, is beyond question. *Hazel-Atlas Glass Co.*, Supra; *Universal Oil*

Products Co. v. Root Ref. Co.,328 U.S. 575, 580, 66 S.Ct. 1176, 1179, 90 L.Ed. 1447 (1946). Rule 60(b) of Federal Rules of Civil Procedure and Advisory Committee Notes thereto. "The spirit of 'fraud on the court' rule is applicable whenever the integrity of the judicial process or functioning has been under cut—certainly in any instance, of misconduct by a party." *Greater Boston Television Corp. v. F.C.C.*, 462 F2d 268,278,149 U.S. App. D.C. 322 (D.C. Cir. 1971).

Further, it has been held that an *appellate court* has the inherent power to inquire into the integrity of its own judgments and to set them aside, *at any time*, when procured by effecting a fraud on the Court. *See Id.*, *See also Hazel-Atlas*, Supra, 322 U.S. at 245, 64 S.Ct. at 1001. (Emphasis Petitioner's)

By its own term, Rule 60(b)(6) clearly and unequivocally provides: "this rule does not limit the power of a court to . . . set aside a judgment for 'fraud upon the Court'". Rule 60(b)(6) F.R.C.P. The 1946 Notes of Advisory Committee, moreover, cites *Hazel-Atlas*—a case brought nearly ten years after proceeding in the Court of Appeals had terminated—"as an illustration of this situation." *See* Advisory Committee Notes to Rule 60(b)(6).

Indeed, since *Hazel-Atlas*, this Honorable Court and all other courts in this country have recognized that the strong policy of finality of judgments must yield to the inherent powers of courts to vacate fraudulently begotten judgment that touch upon the integrity of the judicial system, on the theory that "a decision produced by fraud on the court is not in essence a decision at all and never becomes final." *See Kenner v. Commissioner of Internal Revenue*, 387 F.2d 689, 691 (7th Cir.), *Cert. denied*, 393 U.S. 841, 89 S.Ct. 121, 21 L.Ed 2d 112 (1968); *Serzysko v.*

Chase Manhattan Bank, 461 F.2d 699 (2d Cir.), *Cert. denied*, 409 U.S. 883, 93 S.Ct. 173 (1972); *Wilkins v. Sunbean Corp.*, 405 F.2d 165 (10th Cir. 1968); *Dansuel v. Dansuel*, 195 F.2d 774, 90 U.S. App. D.C. 275(D.C. Cir. 1952); *Lockwood v. Bowles*, 46 F.R.D. 625 (D.C. D.C. 1969); *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626 (D.C. Cal. 1978), *Affirmed*, 645 F.2d 699, *Cert. denied* 454 U.S. 1126, 102 S. Ct. 976, 71 L.Ed 2d 113 (1981); *See* 11 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE § 2870 at 249-251.

Further, neither laches, *Hazel-Atlas* 322 U.S. at 246, 64 S.Ct. at 1001; *Toscano v. Commissioner of Internal Revenue*, 441 F.2d 930, 936-37 (9th Cir. 1971), nor "unclean hands", *Martina Theatre Corp. v. Schine Chain Theatre*, 278 F.2d 798, 801 (2d Cir. 1960), can bar a party from bringing the fraud to the attention of the Court. Also, the fact that there are no adversary parties on the claim of "Fraud on the Court" does not deprive the court of jurisdiction. Since the original judgment, by hypothesis, must have been given in a "case or controversy," the Court continues to have ancillary jurisdiction to determine whether it has been the victim of a fraud. *Root Ref. Co. v. Universal Oil Prods. Co.*, 169 F2d 514, 521-522 (3rd Cir.) *Cert. denied*, 335 U.S. 912, 69 S.Ct. 481, 93 L.Ed 444 (1958).

From the foregoing, it is beyond question that Petitioner's Motion to Vacate Judgment was well within the time limit required by Law, and that the Court below had jurisdiction and the power to investigate Petitioner's claim. Because Petitioner's motion was brought a mere three months after the fact of the fraudulently filed brief was discovered and after rehearing was denied, the Court below erred and misapplied the legal standard governing the time frame of a Motion to Vacate Judgment for "fraud upon the Court". Accordingly, Certiorari should be granted to rectify the misapplication of the law in this case.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE CONDUCT OF THE CO-COUNSEL HEREIN CONSTITUTES A "FRAUD UPON THE COURT."

Having established that Petitioner's Motion was timely made and the Court has jurisdiction to entertain his "Motion to Vacate," the next inquiry (which the Court below should have made) is whether Petitioner's allegation comes within the ambit of "Fraud upon the Court?"

There is a strong consensus among Courts and legal scholars that "Fraud upon the Court" should "embrace only that species of fraud which does or attempts to defile the Court itself, or is a fraud perpetrated by officers of the Court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *See* 7 Moore's FEDERAL PRACTICE, § 60.33 at 515 (1971); *See also Martina Theatre Corp.*, 278 F.2d at 801; (quoting Moore). *See Kupferman v. Consolidated Research and Mfg. Corp.*, 459 F.2d 1072 (2d Cir. 1972); *Greater Coastal Express v. International Broth. Etc.*, 675 F.2d 1349 (4th Cir. 1982).

Hazel-Atlas established that since attorneys are officers of the Court, their conduct, if dishonest or where it involves a deliberate or unconscionable plan or scheme design to improperly influence the Court in its decision, would constitute "fraud upon the Court". *See Hazel-Atlas* 322 U.S. at 245, 64 S.Ct. at 1001; *Kupferman*, supra, at 1078; *Greater Coastal*, supra, 1357; *England v. Doyle*, 281 F.2d 304, 309

(9th Cir. 1960); *see also* Restatement of Judgments § 126 [comment C] (Supp. 1948). Professor Moore has also written that an attorney's "loyalty to the Court demands integrity and honest dealing with the Court. And when he departs from that standard in the conduct of a case he perpetuates a 'fraud upon the Court'". 7 Moore, FEDERAL PRACTICE, supra, at 513.

In *Hazle-Atlas*, the Third Circuit had affirmed a judgment in favor of Hartford upholding a spurious publication upon which it based its claim to patent in both patent office and the Court of Appeals. Hazel-Atlas moved the Third Circuit to vacate judgment for "fraud upon the Court." The Third Circuit, as in this case, declined. This Honorable Court granted certiorari. This Court (per Black, J.) held that the judgment even though obtained more than ten years earlier, must be vacated. It stated:

> Every element of fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not a case of a judgment obtained with the aid of a witness, who on the basis of after discovered evidence, is believed possibly to have been guilty of perjury. *Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals.*

Id. 322 U.S. at 245, 64 S.Ct. at 1001. (Emphasis Petitioner's)

Since the fraud in that case, as in the instant case, had been perpetrated on the Third Circuit, that court was held to be the appropriate court to remedy the fraud *Id.* 322 U.S. at 247-250, 64 S.Ct. at 1002-1003. It was further held that although a party may bring the matter to the attention of the court, this is not essential; the Court may proceed on its own spontaneous motion to expunge a judgment constituting fraud, and anyone may suggest that it do so. *Root Ref. Co.*, 169 F.2d at 521-23; *Martina Theatre* 278 F.2d at 801; *Kupferman*, 459 F.2d at 1074 n.1.

Applying these concepts to the instant case, it is clear that the facts herein fall within the principle enunciated in *Hazel-Atlas*. An analysis of the allegation against Tache would confirm that the charges were warranted and justifiably made. Tache is an officer of the court and the affidavits submitted by the Petitioner and others alone, provide ample evidence, which if proven, would certainly constitute "fraud upon the Court." *Hazel-Atlas*, 322 U.S. at 245, 64 S.Ct. at 1001. For there is little doubt that the surreptious filing of a brief containing misrepresentations by an officer of the court, designed to improperly influence the Court of Appeals' decision, indeed constitutes a "fraud upon the Court" under *Hazel-Atlas*.

III. CERTIORARI SHOULD ISSUE BECAUSE THE COURT BELOW ERRED WHEN IT COMPLETELY OVERLOOKED OR IMPROPERLY MINIMIZED AS "TOTALLY FRIVOLOUS", WITHOUT FOUNDATION, PETITIONER'S FACTUAL ALLEGATION THAT CO-COUNSEL, SIMON TACHE, DELIBERATELY FAILED TO SERVE HIM WITH A COPY OF THE BRIEF TACHE FILED IN THIS CASE.

The pertinent inquiry in assessing frivolousness here is whether Petitioner's allegation of "fraud upon the court" was wholly lacking in factual foundation or legally groundless such that there was no reasonable basis for bringing it. *See*, e.g., *Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, 110 S.Ct. 2447 (1990). *See*

Rule 11 of Fed. Rules Civ. Proc., and Notes of Advisory Committee thereto.)

Petitioner has demonstrated that this motion was not brought for the sheer sake of disturbing the issue of finality or to tax the already stretched judicial resources. But rather, there indeed exists an objectively arguable and reasonable basis in law for the Motion. As a unanimous Court held in *Neitzke v. Williams*, ___ U.S. ___ 109 S.Ct 1827 (1989), "a complaint [or in this case a Motion] containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law, or in fact." *Id.* 109 S.Ct. at 1831. This Court has further held in *Cooter & Gell*, supra, that an abuse of discretion would be found if, as in this case, a court "based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.* 110 S.Ct at 2461.

In order to arrive at a conclusion that the Petitioner's Motion was "totally frivolous", the Court's conclusion must be based on actual finding of facts, not on mere hunch, arbitrary suspicion or assumption. As this Court has stated time and again, "Arbitrary conclusions are not adequate substitute for analysis of the pertinent facts contained in the record." *United States v. E.I. DuPont De NeMours & Co.*,353 U.S. 586,650, 77, S.Ct. 872, 907 (1957).

The decision of the Court below was not based on facts that it found, nor was it supported by the record. The record does not speak to the oral agreement the parties had to write a joint brief, so the Court cannot equally speak to it without a proper hearing. The Court does not dispute Petitioner's contention that he wrote the brief in Philadelphia and in Mr. Tache's office. Nor can the Court speak with any amount of certainty to where, when and how

Petitioner received a brief. A certificate of service is of course valid until challenged. *See generally* Rules 25(b) and (d) of Fed. Rules App. Proc. A mere certification that service has been effected is not conclusive proof that such is the case, especially in this situation where service was purported to have been effected "by hand delivery."

The Court below rests its decision on the assumption that Petitioner, like the Court and the Respondents, got Mr. Tache's brief. There is no support whatever for this assumption. While it is true that an allegation that one did not get a brief is indeed a rare and uncommon occurrence, there is, however, no basis to disbelieve Petitioner without the benefit of an investigation or fact finding. While most attorneys do indeed comply with the service requirement, however, an unscrupulous attorney, such as is involved here, can take advantage of the process to the detriment of an unwary party or in this case a co-counsel.

The question the Court of Appeals should have asked is whether Tache had any motivation for not serving Petitioner his brief? This question has been answered in affirmative in Petitioner's Statement of Facts herein. It should also be noted that had the shoe been on the other foot and one of the more illustrious counsel for Respondents had claimed that he did not receive a brief, one wonders if the same amount of skepticism would have applied.

What objective evidence there is in the record affirmatively supports Petitioner's allegation. Mr. Tache's letter to Mr. Baldus; Mr. Tache's own reference to Petitioner's pre-filing investigation which included the facts he denied; the absence of these denied facts in any previous document filed independently by Tache; the fact that objectively speaking, no reasonable lawyer in Mr. Tache's position would have omitted stating these facts at the earliest opportunity; and evidence of prior *Modus Operandi* pointed out by both the District Court and Respondents herein.

Petitioner Has Right To Be Heard Under Hazel-Atlas And Its Progeny

Petitioner has the right to be heard and requires an opportunity to show that he did not get Mr. Tache's brief. The dilemma of an attorney bringing a motion to set aside a fraudulent judgment, is well recognized. See, e.g., *Universal Oil Prod.*, 328 U.S. at 578, 66 S.Ct. 1178. Since direct proof of a carefully planned scheme or design to defraud, like all acts of fraudulent concealment, is seldom obvious without an elaborate investigation, Petitioner's position thus is unenviable.

The foundation of this Court's decision in *Goldberg v. Kelly*, 397 U.S. 254, 266, 90 S.Ct. 1011, 1120, 25 L.Ed 2d 287 (1970), it should be reiterated, is the observation that "the fundamental requisite of due process of law is the opportunity to be heard." Moreover, "a hearing which does not afford a meaningful opportunity to be heard may be fatal to due process as a denial of any hearing at all. *Greenfield v. Village Industries, Inc.*, 483 F2d 824, 834 (1973). While Petitioner recognizes the concerns of the Court of Appeals that this might be a desperate attempt by an unsuccessful litigant to disturb the issue of finality—a certainly valid assumption—however, this concern was not based on facts that it found. It was based on unfounded conjectures and assumptions.

A charge that an attorney or an officer of the Court knew of and perpetrated "fraud on the Court" is a very serious one indeed, and should not be lightly or recklessly made without substantiation. *See H.K. Porter Co. Inc. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1118 (6th Cir. 1976); *See also Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626,640 (1978). Petitioner is well aware of the gravity of such charges and the potential consequences if it should prove untrue. There exists, however, adequate procedural safeguards and a number of prophylactic devices to guard against such reckless conduct of officers of the Court. There is, for example, the possibility of sanctions on a motion *sua sponte*, disciplinary measures by the Bar, prosecution by the Government, and at the very least, cross-examination by the opponents.

The same procedural safeguards, however, are not readily available without proper inquiry, to litigants. If, as here, Petitioner can prove his case, but is not given the opportunity to do so because of unfounded assumptions, how can the legal system guard or protect such litigants from injustices? This being precisely what occurred in this case, it is clear then that neither Petitioner nor Plaintiff has had his day in Court. *See Toscano v. C.I.R.*, 441 F.2d at 936.

The proper inquiry the Court below should have made to comply with *Hazel-Atlas* is whether Petitioner can substantiate his allegations. For if these allegations have any foundation in truth, as they do, Petitioner's legal rights would have been ruthlessly violated. *See Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773 (1946). *See* 11 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE, § 2870 at 248-251. It is therefore respectfully submitted that the Court below erred and abused its discretion in summarily dismissing as "way out of time" and "totally frivolous" without foundation, investigation or hearing, Petitioner's Motion to Vacate Judgment herein for "fraud upon the Court".

CONCLUSION AND PRAYER

For all the foregoing reasons, Petitioner respectfully prays that a Writ of Certiorari issue to review the Third Circuit's Order of May 20, 1992, dismissing his Motion to Vacate Judgment in this cause for "fraud upon the Court".

Respectfully submitted,

L. Obioma Aham-Neze, Esq.
909 Fannin Street, Ste 590
Houston, Texas 77010
(713) 655-9000

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1886

CTC IMPORTS AND EXPORTS
V.

NIGERIAN PETROLEUM CORPORATION,
GULF SHIPPING AGENCY (NIGERIA, LTD.),
UNIVERSE MARITIME PIREAUS,
MARZELLI, CASA,
MV "VYTINA",
NICHOLAS, CAPTAIN STRATIS,
RICE UNRUH,
RUSSEL, SHELTON, Individually and as
Representative of British Petroleum,
BRITISH PETROLEUM, SOHIO SUPPLY COMPANY
ADDAX OVERSEAS S.A. OF PANAMA

V.

INDAKWA, JOHN, SCHIEFEN, JACK, MATTHEW A., THOMAS P., OLICKAN, JOSEPH, MATHAI, THOMAS, OMUHAMBE, SHADRAH, INTERNATIONAL MARITIME TRANSPORT, INC. BEHRENS, WOLFGANG, LUDWIG, PETER, DOE, JOE ROE, JOHN, XYZ CORPORATION

CTC IMPORTS AND EXPORTS,
SIMON W. TACHE, ESQUIRE,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil Action No. 89-01815)

Argued May 7, 1991

Before: MANSMANN and NYGAARD, *Circuit Judges* and RONEY, *Circuit Judge**

ORDER

L. Obioma Aham-Neze has filed a petition called a Motion to Vacate Judgment for "Fraud Upon the Court." First of all, the motion is filed way out of time. Second, it is totally frivolous.

Accordingly, the motion is denied.

/s/ Nygaard
Circuit Judge

Dated: MAY 20 1992

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* Honorable Paul H. Roney, United States Senior Circuit Judge for the Eleventh Circuit Court of Appeals, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 90-1886

CTC IMPORTS & EXPORTS
vs.
NIGERIAN NAT'L PETROLEUM et al.

Present: NYGAARD, *Circuit Judge*

1. Motion by L. Obioma Aham-Neze, To Recall Mandate
2. For your information: Opinion and judgment were filed December 19, 1991 in this appeal, and on January 17, 1992 an Order was filed denying the petition for rehearing in banc. On May 20, 1992 and Order was filed denying the Motion to Vacate Judgment for Fraud Upon the Court, a copy of the May 20, 1992 Order is enclosed. On May 18, 1992 the Supreme Court denied the petition for Writ of Certiorari filed by L.Obioma Aham-Neze. This Court's Mandate issued on May 22, 1992 in this appeal.
3. Any Answer in response to the above Motion due by June 22, 1992 will be forwarded to you upon receipt of same.

/s/ Barbara Jacobson
Deputy Clerk - Direct Dial 597-8465

ORDER

The foregoing Motion is denied.

By the Court,

/s/ Nygaard
Circuit Judge

Dated: JUN 24 1992

APPENDIX C

MOTION TO VACATE FOR FRAUD UPON THE COURT WITH MEMORANDUM OF LAW

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
PHILADELPHIA, PENNSYLVANIA

NO. 90-1886

CTC IMPORTS AND EXPORTS
Plaintiff-Appellant
v
NIGERIAN NATIONAL PETROLEUM
CORPORATION, ET AL
Defendants-Appellees

MOTION TO VACATE JUDGMENT FOR "FRAUD UPON THE COURT"

TO THE HONORABLE JUDGES OF THE THIRD CIRCUIT:

COMES NOW, L. OBIOMA AHAM-NEZE, Movant in the above captioned and entitled cause, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, and respectfully moves this Honorable Court to vacate its judgment of December 19, 1991, for the important and cogent reason that Mr. Simon W. Tache, Esq., Movant's co-counsel in this case, perpetrated fraud upon this Honorable Court by deliberately, purposefully, knowingly and willfully concealing from this Movant, the brief and the content thereof, which he filed before this Honorable Court, and for deliberately, purposefully, knowingly and willfully failing to serve same instrument in *any manner* (whether by "hand delivery" or by mail) deemed appropriate method of service by the Federal Rules of Civil and Appellate procedures, on this movant.[1] Movant specifically states the following facts:

I.

On December 19, 1991, this Honorable Court handed down its opinion on the above referenced case. Said opinion was recently published at 951 F.2d 573 (3d Cir. 1991), and attached herein as Exhibit "2".[2] Apart from the language that it precluded itself from consideration of Movant's appeal because he did not file a "functional equivalent" of a Notice of Appeal, this Court (per Honorable Nygaard) proceeded to find "facts" which were to reveal precisely why this Movant's Notice of Appeal was defective. This Court stated:

> The most damaging facts are attributable to CTC and perhaps Aham, but not to Tache. At the time of filing Tache was not in a position to know or obtain vital facts. Tache had no reason to suspect CTC's documents were forged. He had never worked for CTC before this matter. He did not know about the fraudulent M/V BARBRO transaction. The ICC investigator did not contact him nor had he any reason to know of the maritime inquiry unless CTC informed him. It did not. Thus, the District Court erred as a matter of law when it imputed knowledge of the information Tache could not have reasonable obtained and liability for not acting on this knowledge. [Exhibit "2" at p. 579]

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[1] The secret brief in question is attached herein as Movant's Exhibit "1".

[2] The District Court's opinion was published at 739 F. Supp. 966, and attached herein as Exhibit "3".

II.

All of the foregoing information about what Mr. Tache knew or reasonably should have known and what he was told, were false. Because Movant was deeply troubled by the source of such blatantly false and inaccurate information Movant called the Court of Appeals on Friday, January 24, 1992 (after his petition for rehearing and suggestion *En Banc* was denied) and ascertained that Mr. Tache had secretly and surreptitiously filed a brief containing the above deliberately misrepresented information, which he, of course, failed to serve on this Movant. Again as I stated previously in my Motion for Reconsideration before the District Court and the brief on behalf of CTC and myself, and my petition for rehearing and suggestion for rehearing *en banc*, there was *no information* available to this movant which Mr. Tache was *not* aware of. Certainly the information about the failed shipment of the M/T BARBRO and the respective conversation between Plaintiff, Mr. Peter Ludwig of International Maritime Transport and Ms. Kuo, the Investigator for International Chamber of Commerce in London, were *all* relayed to Mr. Tache. I *personally* relayed the information the night of March 10, 1989 when I briefed him, not knowing the implication they might have on Plaintiff's case. I also briefed him thoroughly on all these facts when I got to Philadelphia on March 14, 1989. (See Affidavit of L. Obioma Aham-Neze attached as Exhibit "4", for detail).

III.

Mr. Tache's denial of any knowledge of the information he was fully briefed on by both Plaintiff and this Movant, constitutes an intentional misrepresentation of the facts as they were and as he knew them and was a deliberate and orchestrated attempt to mislead, misdirect and misinform this Honorable Court into finding favorably for him regardless of the *truth* and consequences thereof to others.

It provides the powerful incentive and motive why he wanted Movant's Notice of Appeal defective. For it was clear to Mr. Tache that since CTC did not file a Motion to Reconsider, if the Court of Appeals had acted in time to prevent this Movant's brief from being docketed, he would be the only one left to tell his "story", or in this case, mislead and plainly lie to the court about his actual knowledge of the case. He *knew* of course that Movant was privy to all the information which he denied, and was the only person who could refute these intentional misrepresentations. This was precisely why he gave this Movant the false impression that he was *not* going to file a brief; why in filing one, he deliberately failed to serve me; and why after filing the brief, he assiduously avoided any display, mention or action that could alert me to that fact during oral argument before this Honorable Court. (See Movant's affidavit, Exhibit "4".)

IV.

Contrary to the impression created in the mind of this Court by Mr. Tache's secret brief, there was no incentive either on the part of this Movant or Plaintiff to withhold the information regarding the Barbro and Ms. Kuo from Mr. Tache. These information were already in the hands of the defense. Any reasonable person would expect that they would use it. Thus, the attempt to paint this Movant as a devious, scheming person, who was foolish enough to withhold obvious and public information already available to the opponent, from an accomplished expert like Mr. Tache, is very unfortunate indeed. It makes no sense whatever; for plaintiff's theories of recovery and the facts related to this Movant by Plaintiff which were then discussed with Mr. Tache, were predicated on the fact that the cargo consigned to a small and powerless company, was being diverted by a bigger company a *second time*! The first time, Sohio representative Mr. Sheldon Russell claimed Sohio was the outright consignee of the cargo aboard the

Barbro. The second time, Mr. Sheldon Russell hardly knew anything about the cargo carried aboard the Vytina until plaintiff contacted him. Plaintiff knew of Mr. Russell from his first contact regarding the Barbro.

V.

Further, Plaintiff's theory of recovery was also predicated on the fact that the Nigerian authorities were trying to defraud him a *second time*! Plaintiff's theory as this Movant had previously and consistently stated and as it was reviewed with Mr. Tache, was that Plaintiff felt that he was inadequately prepared when the first diversion of his cargo took place the first time. But when the Nigerian authorities asked him to *come back to replace the cargo at no further cost to him*, he accepted. *Naturally*, and quite naturally, and as a matter of *common sense* and *plain logic*, an explanation of what happened the *first time* would be the inquiry anyone would make! Even, if Mr. Tache did not see fit to make these inquiries when he spoke to plaintiff, I made sure he knew. I told him even before he spoke to plaintiff.

VI.

Moreover, Mr. Tache himself prepared plaintiff for deposition and *his notes if untampered with*, should contain these facts. His files on the CTC case should also contain copies of the BARBRO documents given to him upon Movant and Plaintiff's arrival in Philadelphia. Mr. Tache had asked this Movant on March 10, 1989, to fax him only the documents needed to support the Vytina case and bring the rest of the documents, including the papers of the Barbro, along with me to Philadelphia. This was precisely what I did. If, according to his secret brief, knowledge of the BARBRO and the ICC "warning" would have made a difference on whether or not he filed the papers arresting the Vytina, his persistence in the case then, long after these facts were "brought to light" by the defense counsel, without any form of protestation on his part, is pointedly instructive and, should be seriously considered by this Court in assessing Mr. Tache's believability!

VII.

As evidence that Mr. Tache knew precisely what he was doing, the *very first time there was any mention* that the information I provided him was withheld from him, was in the secret brief he filed, which was neither served on me nor Plaintiff, for Movant was by Mr. Tache's designation in the Notice of Appeal, the attorney for Plaintiff, as well as his own counsel. This point bears repeating. *The very first time there was any mention that information was withheld from Tache was in the brief which was not served on CTC or this Movant* (see Movant Affidavit for conditions under which the CTC brief was filed). There was no such mention of such "facts" in the various documents previously filed by Mr. Tache. He did mention it in his defense for Motion for Sanctions (attached herein as Exhibit "5") which thought bearing my signature alone as though initiated, authorized and signed by me, I had absolutely nothing to do with it. I was neither consulted nor participated in that motion before it was filed. (see excerpts of the District Court's comment at Note 1 and the defense counsel's Reply Memorandum attached herein as Exhibits "6" and "7" respectively, stating that although Movant signed the Motion, the thoughts and position were only that of Mr. Tache).

VIII.

More importantly, there was no mention of the withholding of any such information in Mr. Tache's Motion for Reconsideration. Neither was there any attempt on the part of Mr. Tache to file an objection to Movant's Motion for Reconsideration which not only refuted the fact that Movant "assured" him of anything, but stated what the plaintiff's counsel *were told* and what was *withheld from them.* Not even the affidavit which Mr. Tache sent this Movant (attached as Exhibit "8") (which Movant refused to sign because it contained nothing but inaccuracies of the facts) in support of his Motion to Reconsider, contained the fact that any information was withheld from him.

IX.

Further, the brief filed on behalf of CTC and the Movant restated what Plaintiff's counsel knew and what they were not told. Mr. Tache took rough drafts of that brief home. I urged him to do so in order we could get his comments since the brief was being written on behalf of all three parties. He knew what the briefs contained even before they were filed, and obviously if he disagreed with any portion thereof it was incumbent on him to file an objective therefore even after he withdrew from it. This he did not do. Instead, he chose to benefit himself by plagiarizing Movant's brief (a review of some of the facts in the two briefs would reveal certain similarity of the facts and sentences stated therein) and then to burden movant with the facts that never happened because by his calculation, unless the courts revealed it, this Movant would never know what happened to him! (see for example affidavit of Ms. Bernadette A. White attached herein as Exhibit "9", for a strong evidence that Mr. Tache deliberately made Movant's notice of Appeal defective).[3] (See also Affidavits of Messrs. Jack C. Schiefen and Wolfgang Behrens attached herein as Exhibit "10" and "11" respectively, for evidence of the oral agreement of the parties regarding the contents of the Notice of Appeal).

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[3] After mauling over the problem of possibility of bias in regard to the affidavit of Ms. White, given my present relationship, I have nonetheless pressed forward to attach it because nothing short of the truth will do!

X.

The latest revelation of the filing a secret brief comes on the heels of a long pattern of deliberate deception engaged in by Mr. Tache during the entire course of this case.[4] It provides the actual and positive proof and leads to the ineluctable conclusion that Movant's Notice of Appeal was knowingly, willfully, purposefully and deliberately made defective and calculated to misdirect and mislead this Honorable Court into providing Mr. Tache and Mr. Tache alone with access to the Court of Appeals where no one will be able to challenge his intentional misrepresentation to the Court regarding he actually knew about, and what the referring counsel and Plaintiff told him prior to the commencement of this case.

XI

Indeed, Movant perceived this basic character flaw on the part of Mr. Tache, particularly after reading his affidavit and Motion to Reconsider and the ludicrous proposition that an accomplished Maritime expert such as himself dealing with a *disputed* case of bills of lading, and knowing fully well the problem of fraud in this area, could be "assured" of anything; and such "assurance," said to continue even after he had seen the identical documents in the hands of the opponents. Movant perceived that the District Court's imposition of sanction had thrown Mr. Tache into a state of pandemonium and utter panic to the point of desperation, which then made him claw at whatever it took to get out of the sanctions even it, as in this case, it means intentionally misrepresenting the facts to the Court of Appeals. It was for this very reason that this Movant undertook to write the brief on behalf of all three parties sanctioned, to make sure only the facts as they happened were told. In this regard, a review of Movant's brief would demonstrate that Movant never for once shied away from *any* adverse fact. I distinguished them to best of my ability both in my Motion for Reconsideration and in my brief. As a result of this aggressive distinction of the so called "warning" communicated by Ms. Kuo of International Chamber of Commerce, the Appellees backed off that point in this brief. But it was ironically and mischievously reinjected by Mr. Tache in his secret brief. Had these misrepresentations stated in his brief been made known to me before this decision, I would have attacked them just as vigorously as I am now doing. But I was not aware of it.

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[4] For a person who claimed to have stayed on the sideline after the Captain's deposition, a review of all the Motions made, though defensive, would reveal they originated from Mr. Tache's office and were entirely of his own making, save only the three listed in my affidavit in which I joined. He attached his name on these Motions in order to reap whatever reward accrues, but signed my name to provide him deniability should things go awry.

XII.

Moreover, as objective analysis of the documents filed by Mr. Tache unlike Movant's manifests a shifty, sleek but logically inconsistent positions. From a strong position of defending Plaintiff in his answer to Defendant's Motion for Summary Judgment filed well after the Captain and Plaintiff's deposition (attached herein as Exhibit "12"), and in his defense to Motion for Sanctions, Mr. Tache moved to a shaky and insecure position in his Motion to Reconsider, stating in effect, that an expert like himself was told to do the things he did, though admitting in the same vein that he "satisfied" himself that the documents plaintiff had did indeed give him title to the cargo. For example, after stating that

> "having satisfied myself that the documents did indeed establish plaintiff's title to the cargo aboard the vessel, I initiated the proceedings for the arrest of the vessel on Saturday, March 11, 1989." [He proceeds to state that] "Following the deposition of both

> Mr. Indakwa and the Captain, I requested Mr. Aham to enter his appearance for the plaintiff *because of my concern regarding the authenticity of plaintiff's documents*. On March 21, 1989, Mr. Aham entered his appearance for the plaintiff. After the deposition of the captain on March 17, 1989, my role was relegated to that of local counsel and consultation on procedural matters. *Mr. Indakwa continued to assure me that he was in the process of* obtaining authentification of his documents from the Nigerian Authorities. Unable to contact Mr. Indakwa and to receive the documents he had promised, I decided to withdraw completely as local counsel for the plaintiff on *November 13, 1989. For all practical purposes, my direct involvement in this matter was terminated on March 17, 1989*, following the captain's deposition." (Tache's Motion for Reconsideration filed May 9, 1990, and attached here in as Exhibit "13").

XIII.

The logic of the above contention strains common sense beyond reason. Leaving aside for the moment the truth of the matter, it is sheer nonsense. Having determined that plaintiff's case was problematic, his advise, according to his statement, to his co-counsel who was relying on his expertise was: "hay come on in, and enter your appearance." For what purpose? Come in and do what? If by his assessment, the case was without merit, advising a reliant co-counsel to enter his appearance in the face of such uncertainty, speaks volumes of the kind of advice he renders. The record, however, belies this contention. First, the transcript of the Captain's deposition would show that I tried to enter my appearance and had serious argument and disagreement both with Mr. Tache and the defense counsel *well before* the captain's deposition commenced. Secondly, the before the Honorable Judge Shapiro, Mr. Tache was asked what he wanted to do with the "Vytina".

He responded that he wanted to hold it for "jurisdictional purposes" and let the cargo go. This logic, of course, was mindbuggling and contrary to Plaintiff's objectives. Judge Shapiro responded that "surely, that will not be in your interest." After viewing this performance and Judge Shapiro's comments that "both sides has a lot to discuss, go settle your case," I decided to enter my appearance to help achieve our client's objective, instead of relying completely on Mr. Tache's illogic.

XIV.

Finally, Your Honors, this Movant has been seriously and unwarrantingly misunderstood, maligned, and misjudged; severely prejudiced and unfairly penalized; unjustly cast in bad light, defamed, injured and wronged; and most importantly, denied the process that was due under the law, for doing everything that was not only legal under the law but mandated under the rules of professional responsibility: merely referring a case to an expert and entering his appearance in a case which was deemed to have merit at the time of the entry. Paraphrasing the often-quoted words of the Honorable Abraham Lincoln, "an attorney's words" — and I might add, his reputation — "are his stock-in-trade". The damage to this Movant's personal and young legal career and reputation as a result of the publication and world wide distribution of two adverse opinions, is irreparable! These opinions are, in the case of the District Court, regrettably ill-advised, logically flawed and based on unsubstantiated and prejudiced assumptions; and in the case of the opinion issued by this Court on December 19, 1991, simply based on lies! Had the "facts" not been restated by this Court, Movant's might never have had any legal recourse for redress. The legal basis for this Motion to vacate for fraud upon this Court is set forth in the accompanying Memorandum of Law.

WHEREFORE PREMISES CONSIDERED, Movant, L. OBIOMA AHAM-NEZE, respectfully moves that the decision of this Honorable Court rendered on December 19, 1991 and published at 951 F.2d 573 (3rd Cir. 1991) be immediately withdrawn and vacated in its entirety for fraud upon this Court; that the Sanctions imposed on this Movant be vacated; and that this Honorable Court award him attorney's fees, costs for bringing this Motion, and render *a declaratory judgment vindicating this Movant*; and further, grant this Movant any and all other remedies to which he may be rightly and justly entitled both at law and equity. In the alternative, Movant respectfully prays for an evidentiary hearing to consider the issues raised herein.

Respectfully submitted,

L. Obioma Aham-Neze, Esq.
909 Fannin, Suite 590
Houston, Texas 77010

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT PHILADELPHIA, PENNSYLVANIA

NO. 90-1886

CTC IMPORTS & EXPORTS
Plaintiff-Appellant
v
NIGERIAL NATIONAL PERTROLEUM CORPORATION, ET AL
Defendants-Appellees

MEMORANDUM OF LAW IN SUPPORT OF MOVANT L. OBIOMA AHAM-NEZE'S MOTION TO VACATE FOR "FRAUD UPON THE COURT"

COMES NOW **L. OBIOMA AHAM-NEZE**, Movant in the above captioned and entitled cause, and pursuant to Rule 60(b) of the Federal Rules of Civil Procedures, respectfully files this Memorandum of Law in Support of his Motion to vacate judgment rendered by this Court in this cause for "Fraud Upon the Court".

The power to vacate a judgment that has been obtained by "fraud upon the Court", the United States Supreme Court has stated, is inherent in courts. ***Universal Oil Products Co. v. Roots Ref. Co***, 328 U.S. 575, 580, 66 S.Ct. 1176, 1179, 90 L.Ed. 1447 (1946). ***Hazel-Atlas Glass Company v. Hartfort Empire Company***, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). "The Spirit" of fraud on the court rule[1] is applicable whenever the integrity of the judicial process or functioning has been undercut — certainly in any instance, of misconduct by a party." ***Greater Boston Television Corp. v. F.C.C.***, 462 F.2d 268, 278, 149 U.S.App. D.C. 322 (D.C. Cir. 1971). Further, it has been held that an appellate court has the inherent power to inquire into the integrity of its own judgments and to set them aside when fraud or corruption of its officers has been shown. ***Hazel-Atlas, Supra***, 64 S.Ct. at 1001, 322 U.S. at 245. Attorneys are officers of the court and when they address the Court [whether in writing or orally] upon a matter before it, their declarations are virtually made under [the continuing obligation of their] oath. *See eg.*, ***Holloway v. Arkansas***, 435 U.S. 475, 485-86, 98 S.Ct. 1173, 1179 (1978) (quoting ***State v. Brazile***, 226 La. 254, 266, 75 S.2d 856, 860-61 (1954).

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[1] *See* Final Saving Clause of Rule 60(b) of Federal Rule of Civil Procedure.

In the leading case of ***Hazel-Atlas Glass Co. v. Hartford Empire Company***, *Supra*, this Honorable Third Circuit had affirmed a judgment in favor of Hartford and against Hazel for patent infringement. More than ten years later, Hazel filed a petition in the Third Circuit asking that judgment be set aside. It established that an attorney for Hartford had written an article extolling the patent as a remarkable advance and had arranged to have the article printed in a trade journal under the name of an ostensibly disinterested expert. Both the Patent Office, in granting the patent, and the Third Circuit in upholding its validity, had relied in part on the article. The Supreme Court (per Black, J.) held that the judgment must be vacated. It stated:

> Every element of fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not a case of a judgment obtained with aid of a witness, who on the basis of after discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliber-

> ately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals.

Id. 322 U.S. at 245, 65 S.Ct.1001

The Supreme Court continued:

> Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that the preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so important that they must always be mute and helpless victims of deception and fraud.[2]

Id. 322 U.S. at 246. 64 S.Ct. at 1001

Since the fraud on that case as in the instant case had been perpetrated on the Third Circuit, that Court was held to the appropriate court to remedy the fraud. *Id.* 64 S.Ct. at 1002-1003, 322 U.S. at 247-250. It was directed by the Supreme Court to vacate its original judgment in favor of Hartford and deny all relief to Hartford. The Supreme Court went on to hold that the power to vacate for fraud exists in every court. *Id.* 64 S.Ct. at 1002-03, 322 U.S. at 247-250.[3] Thus, this Honorable Court has jurisdiction to entertain this Motion. Further, although a party may bring the matter to the attention of the Court, this is not essential; the Court may proceed on its own motion. ***Universal Oil Prod. Co. v. Root Ref. Co.***, 66 S.Ct. 1176, 328 U.S. 575, 90 L.Ed. 1447 (1946)[4] The fact that there are no adversary parties on the claim of fraud on the court does not deprive the court of jurisdiction, since the original argument, by hypothesis, must have been in a "case or controversy". The Court continues to have ancillary jurisdiction to determine whether it has been the victim of a fraud. *Id.* There is no time limit on setting aside a judgment on this ground, nor can laches bar consideration of the matter. *Id.*[5] And it does not matter whether a party bringing the fraud to the court's attention has clean hands. *Id.*, ***Martina Theatre Corp. v. Schine Chain Theatres, Inc.***, 278 F.2d 798, 801 (2d Cir. 1960). Moreover, if it is found that there was a fraud on the court, the judgment should be vacated and the guilty party denied all relief. *Id.*, ***Hazel-Atlas***, 64 S.Ct. 1003-04, 322 U.S. at 250-51. The entire cost of the proceedings including attorney's fees, may be assessed against that party. ***Universal Oil Prods.***, *Supra*, 66 S.Ct. at 1179, 328 U.S. at 580.

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[2] The *Hazel-Atlas* Court thought it immaterial that Hazel may not have exercised proper diligence in uncovering the fraud, nor to the extent the articles had impressed the judges who voted to uphold the patent. Its primary concern was the existence of a deliberate scheme to fraud. *See Id.*

[3] *See* Wright and Miller, Federal Practice and Procedure §2870 at 247-257.

In the instant case, not only was deliberate concealment of Mr. Tache's brief from this Movant an affront to the mandatory notice requirement codified in F.R.A.P. 25(b) and (d) and a denial of due process, it was trial by ambush! By deliberately making Movant's notice of appeal defective and thus removing Movant from the process, Mr. Tache knew, of course, that he could proceed to tell this Honorable Court of Appeals whatever he wanted even if, as in this case, they were bald lies. Had the Court of Appeals not mentioned these facts in its opinion, this Movant might not have been able to discover the truth about the secret brief he filed and would have had no recourse at all. Movant thus prays that this Motion to Vacate this fraudulently obtained judgment be granted for denial of the process that was due this Movant and for "fraud upon the Court".

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[4] Wright and Miller, Supra §2870, P. 250.

[5] Citing ***Serzysko v. Chase Manhattan Bank***, 461 F.2d 699 (2d. Cir. 1972) Cert.Denied, 93 S.Ct. 173, 409 U.S. 883, 34 L.Ed. 2d 139.

WHEREFORE, PREMISES CONSIDERED, Movant **L. OBIOMA AHAM-NEZE** respectfully prays this Honorable Court to vacate its judgment of December 19, 1991; set aside the sanctions imposed on this Movant; grant this Movant attorney's fees and costs bring this motion and any and all other remedies to which this Movant may be rightly and justly entitled at law and equity including a declaratory judgment vindicating this Movant.

Respectfully submitted,

L. Obioma Aham-Neze, Esq.
909 Fannin, Suite 590
Houston, Texas 77010
(7130 655-9000

[CERTIFICATE OF SERVICE OMITTED IN THIS PRINTING]

APPENDIX D
AFFIDAVIT

THE STATE OF TEXAS
COUNTY OF HARRIS

I, L. OBIOMA AHAM-NEZE, being duly sworn on oath, under penalty of perjury and mindful of my continuing oath and obligation as an officer of the Court and the gravity of the information contained herein, I hereby depose and aver the following:

I.

That I am a member in good standing of the bar of the Commonwealth of Pennsylvania and the Court of Appeals for the Third Circuit.

II.

That along with Mr. Simon W. Tache, Esq. of 1700-06 Race Street, Philadelphia, PA 19103, I was co-counsel for plaintiff in the matter of *Imports and Exports v. Nigerian National Petroleum Corporation, et al*, Cause No. 90-1886. On or about January 24, 1992, after my petition for rehearing and suggestion *en banc* had been denied, I called the office of the Clerk for the Third Circuit to ascertain whether Mr. Simon W. Tache had filed a brief in this cause, because I was deeply disturbed by the "facts" recited in the opinion authored by the Honorable Nygaard which were in *all* respects false. The clerk's office confirmed that Mr. Tache filed a brief on 22nd January, 1991 and that I was one of the parties listed as "served".

III.

That I was never served either "by hand delivery" personally by Mr. Tache himself or by any other person acting on his behalf, with a copy of the brief filed by Mr. Tache in this case, at any time on or before January 22, 1991, nor at any time thereafter. Neither did I receive nor was served the same instrument by any form of mail either public or private or both, at my then mailing address of 5959 West Loop South, Suite 450, Bellaire, Texas 77401 or at any address known to Mr. Tache. I further state that I was never served neither did I receive a copy of a civil information sheet, if any, filed by Mr. Tache in this case.

IV.

That the only pieces of documents I received from Mr. Tache regarding the above captioned cause were: a "Notice of Appeal"; a letter by Mr. Tache of February 7, 1991 to Mr. Bradford Baldus of the Third Circuit stating that I intended to appeal in my individual right, written at my behest; and a copy of a letter brief responding to the Court's inquiry regarding Rule 60(b) mailed to me in August, of 1991.

V.

That I received *all* the copies of the documents filed by the Defendants-Appellees in the above referenced cause.

VI.

That upon learning from the clerk's office that another brief had been filed by Mr. Tache, I immediately called Mr. Bradford Baldus and informed him of the fact that Mr. Tache had deliberately failed to serve me with a copy of his brief despite what the certificate of service says. Mr. Baldus asked me to make a motion to the court requesting a reconsideration of the judgment and he'll forward it.

VII.

That to the best of my knowledge, information and belief, and after a thorough perusal of Mr. Tache's brief which was obtained from the Third Circuit on February 21, 1992, more than one year and one month after it was supposedly "served" on me "by hand delivery", I declare that the facts contained therein which this Court relied on in its decision are false. For example, pages 9 through 14 of the brief says that the information about Ms. Kuo of the International Chamber of Commerce was not communicated to him and that he was not told about the failed shipment of the Barbro. Neither fact is true. I *personally* told Mr. Tache of these facts, not knowing myself the implication they would have on Plaintiff's case. Again, as I mentioned on numerous occasions previously, the case came to me one and a half days before I referred it to Mr. Tache. Contrary to the impression conveyed in the Court's opinion, *I too had never worked in any capacity for CTC prior to this case.* I had just barely left school when this case came to me. And I never for once "assured" Mr. Tache of *anything.* My only representation to Mr. Tache, again mindful of my oath, was that the information and documents Plaintiff had seemed too genuine not to have come from within the ranks of the governmental officials in Nigeria. I then referred and gave him Plaintiff's number to speak with plaintiff himself to verify for himself since he is the expert. I was not present when Mr. Tache spoke to Plaintiff at his home. The amount of time he chose to spend speaking with plaintiff was, of course, entirely his prerogative. No assurances whatsoever were given!

VIII.

That upon my arrival in Philadelphia on Tuesday, March 14, 1989, I personally, fully and completely, briefed Mr. Tache. He was shown *all* the papers that Plaintiff brought with him *including* the papers of the "Barbro" which formed an integral part of Plaintiff's claim. He made copies for himself. He himself *prepared* the plaintiff for deposition on the evening of March 16, 1989 and again on

March 17, the morning of plaintiff's deposition. The matters of the failed shipment of the "Barbro" and the I.C.C. "warning" were discussed. Indeed, Plaintiff's theory for recovery as it was related to me, would have made no sense without the "Barbro" incident. It was because the diversion of the cargo was happening *a second time* to a powerless client that gave the impetus to refer the case to an expert. Mr. Tache asked questions pertaining to these matters he now claims was withheld from him. I was present when these discussions took place. And if Mr. Tache could be trusted to produce the papers he used in preparing Plaintiff for deposition intact, without doctoring or destroying them, that evidence would speak for itself.

IX.

When the questions about Ms. Kuo of the International Chamber of Commerce's "warning" and the "Barbro" were asked by four defense counsel present at Plaintiff's deposition, Mr. Tache never expressed surprise, not even for once. He never signaled this discontent nor did he threaten to resign in protestation. He continued very *actively* in the case, initiating nearly all the motions made by the sanctioned parties in this case. He did not file his resignation until November, 1989. With the possible exception of three motions which had my prior approval:

1. Motion in opposition to the Defendant's Motion for Summary Judgment,
2. the Third Party Defendants' Motion to Dismiss and for Summary Judgment,
3. my own Motion to Withdraw,

all other motions made in this case whether bearing my signature alone or both of the counsel's signatures were made without my express prior oral or written approval or consultation and drew my repeated warnings to Mr. Tache to desist from such reprehensible practices. I was only notified about these motions after the fact. And the reason I even got copies was because I demanded in the strongest terms to have copies of every motion bearing my name and signature so I could review them for any adverse comments. Because I believed my entire role was largely nominal apart from referring the case, I took no further action on these matters, believing that the district court would indeed see that I was not a candidate for sanction and moreover, because all the motions made after the dismissal of the case without prejudice, were entirely defense in nature, none of which was initiated by us.

X.

That I spend every day and evening between December 29, 1990 until the date Appellants' brief was supposed to be filed, January 22, 1990, in the library of Mr. Tache's office, writing what was supposed to have been the only brief of the three parties sanctioned, as I and Mr. Tache had agreed. The Brief which eventually ended up with CTC and my name only, had up until the afternoon of January 22, 1991, the names of all three Appellants. Just before it was due to be filed that afternoon, Mr. Tache all of a sudden withdrew his name stating that my treatment of the law governing Rule 11 sanctions had already covered his part of the issues concerning him, that he needed no independent brief. I added his name *three times* to the brief with every correction and, *three times* the briefs came back from his secretary, Ms. Debbie Erardi, without his name. I finally confronted him and asked whether he intended to file a separate brief. He answered he did not think so, since I had already covered the facts and the issues. I asked if there was any fact in the brief which was not true, he answered no. Why then, I asked was he withdrawing, he answered that with me living in Houston and him living in Philadelphia, he did not want to antagonize anybody, so it would be preferable for him to stay on the sideline. Because it was already late in the day and the chances of writing another brief, I thought, were slim, I left the matter like that, warning, however, that in the unlikely event that he decided to write a separate brief, I must be notified immediately. He agreed. I signed my motion to enlarge content of my original brief since it was more than 50 pages, and left Mr. Tache's office about 5:30 p.m. that January 22, 1991, after Mr. Tache and his secretary had gone to file the CTC brief and the Appendix, *without being "handed" a brief filed by Mr. Tache,* because by his representation, he had not written one at that time.

XI.

That I came back to Philadelphia about the middle of February to conform my brief to the required 50 page limit since my motion to enlarge content was denied. Again, I was never handed any brief or even told that one was written. Mr. Tache actively helped to conform the brief and I suspect in order to lure me to a slumber over discovering that he had actually filed a brief on January 22, 1991. Of course still assuming that my brief covered his interest since there was no contrary indication, I asked Mr. Tache what he would have done if I wasn't around to correct the brief? He said he would have "made a motion to include the briefs in the appendix." And how would that have covered his interest I asked? Mr. Tache responded that he "would have awaited response to the motion before filing a separate brief." I further remarked to Mr. Tache that if he hadn't pulled out in the last minute I would not have had the problem I encountered in trying to file my brief, because part of the reason for the joint appeal, I said to him, was for us to benefit from his membership of the Third Circuit bar in the event that my application was not completely processed by the time the briefs were ready to be filed. Mr. Tache replied that if he knew my application would have taken so long to approve, he would never have withdrawn. This conversation took place in the middle of February well over two weeks after he had already filed his brief. Not once did he tell me "Look this is your problem, I filed my own separate brief." He led me to still believe that he was still with me in the brief I had filed even though he did not file one.

XII.

Furthermore, when I returned in May, 1992 to prepare for oral argument, Mr. Tache helped prepare and briefed me. I was shocked to find out the next morning that he was also arguing. I questioned him about that and stopped to avoid making a scene. But most importantly, Mr. Tache assiduously avoided any open display on the counsel table of the brief he had surreptitiously filed, fearing that I may discover what he had done.

XIII.

In light of the revelation of the surreptitiously filed brief I should again like to point out certain pertinent facts regarding my defective notice of appeal, for I find it wonderfully if not mysteriously "coincidental" that the same person who gave a notice of appeal in a manner different from what he had originally agreed to, also surreptitiously tendered a brief in that same matter.

XIV.

I had called Mr. Tache on- or about October 25, 1990, to see if he was interested in filing a joint brief. He expressed his interest in so doing. We *agreed* that he should have the task of giving the notice on behalf of *all* the parties sanctioned in their individual capacities. I reiterated this several times during the course of the conversation. There were two witnesses present during the conversation: Mr. Wolfgang Behrens and Mr. Jack Schiefen. Mr. Tache was informed of this fact also. I called him at least on two to three other occasions requesting that he send me a copy of the materials to be included in the appendix which he had agreed to send. On each occasion, I would inquire whether he has filed the notice and each time he would assure me that it would be done in the manner we specified. On one occasion I got hold of Ms. Debbie Erardi, his secretary, I asked whether the notice had been given. She said Mr. Tache had indicated that it should be given on the 21st of November. Again, I told her specifically the manner in which it should be written. Mr. Tache and his secretary signed my name to the notice of appeal as evidence of our agreement but failed deliberately to give the notice in the manner specifically agreed to. Given such elaborate deception, I hardly suspected anything was amiss until the Court's opinion alerted me to the fact that another brief, which was deliberately withheld from me, may have been filed. Had this Court not mentioned those "facts" I would have never really known why my notice of appeal was defective.

/s/ L. Obioma Aham-Neze
L. Obioma Aham-Neze (Affiant)

SWORN TO AND SUBSCRIBED BEFORE ME, on this the 24th day of March, 1992, to certify which witness my hand and seal of office.

/s/ Mary E. Taylor
Notary Public in and for
The State of Texas
My Commission Expires: 11-10-93

APPENDIX E

Affidavit of Cecil Roy Riley

The Affiant Cecil Roy Riley, appeared before the undersigned authority this date and having been duly sworn on oath and under penalty of perjury avers the following:

My name is Cecil Roy Riley. I presently reside at 12 Norbrook Way, Kingston, Jamaica. Prior to August of 1991, I resided at 5210 Drexel Road, Philadelphia, Pennsylvania 19131.

I am aware of the **CTC, et al v. Nigerian National Petroleum Corp., et al** case involving sanctions against the plaintiff and his attorneys, Mr. L.O. Aham-Neze Esq. and Mr. Simon Tache. I have known about the case since it commenced in March of 1989. I have known Mr. Aham-Neze since 1985 when we first met at Rutgers University School of Law in Camden, New Jersey. We've been close friends ever since then. In this capacity, we have discussed every detail of this case together.

Mr. Aham-Neze recently approached me requesting that I relate my personal knowledge of this case because the Court of Appeals for the Third Circuit had termed the Motion to Vacate for "Fraud Upon the Court" detailing some of the events that took place between himself and his former co-counsel Mr. Simon Tache as "frivolous". I have read Mr. Aham-Neze's motion and hereby declare under oath that it is not frivolous because I was privy to some of these events. Those facts that I was not privy to, were related contemporaneously to me by Mr. Aham-Neze.

Mr. Aham-Neze stayed with me at my then residence of 5210 Drexel Rd., Philadelphia, PA 19131 in all but his first trip (in March of 1989) to Philadelphia. I can vouch that he stayed with me and my family for the entire period of the initial brief between December 30, 1990 until January 25, 1991, and again about middle to the end of February of 1991. I remember vividly dropping him off at the airport on his February, 1991 trip. Again, we discussed the case.

I must say that there was never a doubt that Mr. Aham-Neze believed and in fact wrote the brief on behalf of all the three parties sanctioned in the case. We were all under that impression. I personally drove him to Mr. Tache's office on numerous ocassions while he was working on the brief. He took the subway when I was not able to take him. Moreover, I read every draft of the initial brief including the final copy. We discussed his progress on the brief, and the issues everyday either in the car or after he got home.-I critiqued the brief as was our practice in Law School at Rutgers University.

After Mr. Tache removed his name from the brief on the day the brief was filed, I questioned his motives privately to Mr. Aham-Neze, who told me that Mr. Tache explained that he was merely trying not to antagonize the defendants and the District Court with whom he has to do business long after Mr. Aham-Neze has gone back to Houston.

When news go to me that Mr. Aham-Neze's Notice of Appeal was defective, I resumed my suspicion of this whole affair. I felt it was a case of an old hat trying to take advantage of a reliant neophyte in the game. To the best of my knowledge, Mr. Aham-Neze did not leave Philadelphia with any brief other than the one he wrote. I cannot imagine any circumstance where he would have gotten any brief from Tache and not mention it. He was already weary of that fact anyway.

About the beginning of May, 1991, Mr. Aham-Neze came back to Philadelphia for argument. Again he stayed with me. I tried to prepare him for oral argument as best I could. Because we thought he was going to be the only arguing counsel since he did the brief, we tried to cover all the grounds, including Mr. Tache's Rule 11 areas.

On the morning of the argument, I drove Mr. Aham-Neze to Mr. Tache's office where both of them had scheduled to meet. But to our surprise, we were told that Mr. Tache had already left for the Courthouse. Upon reaching the Courthouse, we found Mr. Tache sitting on the counsel table. He motioned Mr. Aham-Neze to go and reserve only seven and one-half minutes because he had already reserved seven and one-half minutes. I watched Mr. Aham-Neze's face change. He began to argue with Mr. Tache over not telling him that he (Tache) was going to argue when he didn't write a brief. In any case, Mr. Aham-Neze went to sign in and I took my seat at the back with the rest of the public.

I'd like to conclude this affidavit by reiterating that I have known Mr. Aham-Neze for approximately seven years. He is perhaps stubborn when he is right, but definitely not one to make anything up. That would be very uncharacteristic indeed.

/s/ Cecil Roy Riley
Cecil Roy Riley

Sworn and Subscribed to before me:
Date: 8/7/92

/s/ Chineta A. Glanville
Chineta A. Glanville, Notary Public

APPENDIX F

AFFIDAVIT

THE COMMONWEALTH OF PENNSYLVANIA COUNTY OF PENNSYLVANIA

BEFORE ME, the undersigned authority on this day personally appeared Bern'adette Anne White, who after being duly sworn deposes and says as follows:

1. My name is Bern'adette Anne White.
2. I am over 18 years of age and of sound mind.
3. I reside at 903 E. Phil-Ellena Street Philadelphia, PA 19150.
4. I am a former client and employee of Simon W. Tache, Esq. I began working for Mr. Tache in September, 1990 as a receptionist. I resigned my position on January 31, 1992.
5. I became aware of the CTC Litigation in my capacity as the receptionist. I directed calls during the period of my employment on numerous occasion from Mr. L. Obioma Aham-Neze to Mr. Simon Tache, and a few times to Ms. Debbit Erardi.
6. I first became acquainted in person with Mr. Aham-Neze in late December of 1990 when he came to the office to work on the CTC brief. He left after the brief was filed. But he came back in February and again in May, 1991. Mr. Aham-Neze and I began dating on May 7, 1991, the day after the oral argument in the Court of Appeals. We became engaged in late October last year. My relationship with Mr. Aham-Neze prior to May 7, 1991 was strictly professional.
7. The reason for this affidavit is to relate the substance of the several conversations I had with Mr. Tache regarding Mr. Aham-Neze.

8. Sometime in June or July 1991, Mr. Tache became aware of my romantic involvement with Mr. Aham-Neze. Mr. Tache tried to talk me out of it on several occasions. He said that all he wanted to do was "protect me." When news of my engagement to Mr. Aham-Neze reached him in November Mr. Tache offered his congratulations and inquired when the wedding would take place. I said I was not sure, he tried again to dissuade me. Sometime in early December, I went to his office to inquire about my personal injury case he was handling. Mr. Tache inquired again about the date of my wedding. Before I could even respond he said, "I'll tell you what. You hold off the wedding until February or March of 1992, something would happen to Obii at that time that will affect him in an adverse way and you will think twice about marrying him." I asked what exactly he was getting at. Mr. Tache repeated, "Just hold off the wedding, you'll see." I took this statement and other things he said seriously, but did not understand why he would say such a thing. After two days of pondering these words, I called Mr. Aham-Neze to inquire whether he was hiding anything from me. I proceeded to tell him of Mr. Tache's warning. Mr. Aham-Neze dismissed them. I thought about what Mr. Tache said to me and almost broke off the engagement. It was not until late January/early February of this year that I did become aware of what Mr. Tache was referring to. Mr. Aham-Neze called me about then and told me that he was bothered by the facts mentioned by the Court of Appeals decision and called the court to find whether another brief was filed in the case. He said the court's clerk's office confirmed that Mr. Tache had filed a brief. Mr. Aham-Neze said that he knows why his Notice of Appeal was defective.

> He asked if I would go to the court and get a copy of that brief. I obtained a copy on the 21st of February 1992 and sent it to him.

As I could no longer stand Mr. Tache's pressures, I told him in early December that I will be resigning my employment effective the first of the year. I did not tender my notice until the middle of January. I resigned on January 31, 2992.

/s/ Bern'adette Anne White
AFFIANT

SUBSCRIBED AND SWORN to before me this 16 day of March, 1992.

/s/ Victor H. Godorov
Notary Public for the
Commonwealth of Pennsylvania

My Commission Expires:

APPENDIX G

AFFIDAVIT

THE STATE OF TEXAS

COUNTY OF HARRIS

BEFORE ME, the undersigned authority, a Notary Public in and for Harris County, Texas, on this date personally appeared JACK SCHIEFEN, who after having been by me first duly sworn upon his oath deposes and says as follows:

I am an agent for State Farm Insurance, Co. My office is located at 5959 West Loop South,, Suite 450, Bellaire, Texas 77401. I am aware of the CTC litigation. I have a deposition in this case back in April, 1989. Mr. L. Obioma Aham received his mail concerning the CTC litigation at this office. On or about the week of October 25, 1990, Mr. Aham came into my office to discuss the implication of the denial of his Motion to Reconsider filed before the district court in Philadelphia. Mr. Wolfgang Behrens was visiting the office at the time. Mr. Aham said that he was going to Appeal the denial of his Motion to the Third Circuit and called Mr. simon Tache to see if he was interested in coordinating the appeal. Mr. Aham then told Mr. Tache to file the Notice of Appeal as to both of them in their individual capacity and also as to CTC as a corporation. Though he doubted CTC's chances since there was no Motion to Reconsider filed on its behalf. I and Mr. Behrens were present during this conversation. Mr. Aham also told Mr. Tache of this fact. They agreed to divide the job. Mr. Aham was to write all the briefs while Mr. Tache would undertake all the administrative tasks starting with the Notice of Appeal and the Appendix. About a week later, Mr. Aham came back to the office to call Mr. Tache. When he did not reach Mr. Tache, he called his secretary Ms. Debbie Erardi and inquired whether the Notice of Appeal has been filed. Ms. Debbie Erardi said Simon had informed her to file the Notice on November 21, 1990.

Mr. Aham reminded her that it must be filed as to him individually, as to Mr. Tache individually and as to CTC as a corporation. Ms. Debbie Erardi agreed.

Shortly after Mr. Aham came back from filing his brief in Philadelphia in the last week of January, 1991, he showed me several letters—one dated January 24, 1991 and stating that the brief cannot be docket as him in his individual capacity because the Notice of Appeal did not mention that he was appealing in his individual capacity. Another letter dated January 25, 1991 said he was not a member of the Third Circuit and he should come and get his briefs or they will be destroyed. Again, Mr. Aham called Mr. Tache and asked why he left his (Mr. Aham's) name out in his individual capacity despite all the reminders to include it. Mr. Aham then told Mr. Tache to write to the Court of Appeals explaining to them that it was his (Tache's) fault that the omission occurred. Mr. Tache agreed to write such a letter. Mr. Aham showed me this letter when he received it sometime in the middle of February. On December 24, 1991, I called, Mr. Aham about a letter he got from the Court of Appeals in Philadelphia. He came by, opened it and told me that the court refused to consider his appeal because they said he did not file a proper Notice of Appeal. On Friday, January 24, 1992, I received a call from Mr. Aham. He said he was deeply disturbed by certain facts the Court of Appeals raised and that he had called the Court of Appeals to inquire whether another brief was filed and the clerk's office confirmed that Mr. Tache had also filed a brief. I am aware that I am under oath and subject to penalty of perjury in making these statements. Neither I nor any member of my staff received any brief written by Mr. Simon Tache in this case. All of Mr. Aham's letters regarding this case were kept separately. Mr. Aham invariably discusses every piece of correspondence he gets from this Court regarding this case with me, either right after he picks it up or later that day or the next. To the best of my knowledge, there was no mention of discussion of Mr. Tache's brief. Mr. Aham has always been under the impression that he wrote the brief on behalf of all the three parties involved. He was very surprised to find that another brief existed, so was I. When Mr. Aham approached me last week and asked it I would be willing to swear an affidavit detailing the conversation he had over the phone with Simon Tache in my presence and his secretary regarding filing a Notice as to him (Mr. Aham individual) and the materials I received in this office, I said I would be willing to do that.

/s/ Jack Schiefer
Affiant

SUBSCRIBED AND SWORN to before me on this the 12 day of February , 1992.

/s/ Carolyn Rose
Name, Notary Public in and
for the State of Texas

My Commission Expires:

4-13-92

APPENDIX H

AFFIDAVIT

THE STATE OF TEXAS

COUNTY OF HARRIS

I, WOLFGANG E. BEHRENS, duly sworn on oath depose and say as follows:

I am aware of the CTC litigation. I gave a deposition in this case sometime in April, 1989. I am a friend of Mr. Jack Schieffen and I visit him quite frequently, usually on my way from business dealings with a Maritime Company on the seconf floor of 5959 West Loop South building in Bellaire, Texas.

On or about the week of October, 1990, I was visiting Mr. Schieffen when Mr. Obii Aham came by to talk with Mr. Schieffen about the District Court's denial of his Motion to Reconsider. Mr. Aham said he wanted to appeal his case and called Mr. Simon Tache in our presence to discuss the appeal. He told Mr. Tache several times during the conversation that both Mr. Schieffen and myself were there (the phone was on speaker) and he urged Mr. Tache to give the Notice of Appeal as to both him (Mr. Aham) and Mr. Tache in their individual capacity and CTC in its corporate capacity. He repeated this several times during the conversation. Mr. Tache agreed to do this. Mr. Aham said he would do all the briefs if Mr. Tache would do the administrative things. Mr. Tache also agreed. Next thing I know, Mr. Aham informed me that the court of Appeals rejected his appeal because Mr. Simon Tache did not put his name correctly in the Notice of Appeal as they had both agreed. Mr. Aham asked if I would swear this affidavit recalling the conversation he had with Simon back in October, 1990. I agreed.

/s/ W. Behrens
Affiant

SUBSCRIBED AND SWORN to before me on this the 12 day of February, 1992.

/s/ Carolyn Rose
Name, Notary Public in and
for the State of Texas

My Commission Expires:

4-13-92

APPENDIX I

SIMON W. TACHE, P.C.
A PROFESSIONAL CORPORATION
OCEAN LAW COMPLEX, SECOND FLOOR
1700-06 RACE STREET
PHILADELPHIA, PA 19103

February 7, 1991

HAND DELIVER

Bradford Baldus, Esquire
Legal Coordinator
Office of the Clerk
United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
601 Market Street
Phila., PA 19106-1790

Re: Docket No. 90-1886
CTC Imports and Exports, et al. v. Nigerian Petroleum, et al.
D.C. Civ. No. 89-01815

Dear Mr. Baldus:

As you know, I am one of the Appellants in the above-captioned matter. I am writing in response to your letters of January 24 and 25, 1991, to L. Obioma Aham, Esquire, and would request that this letter be forwarded on to the merits panel for its consideration.

While the Notice of Appeal filed in this matter did read "Notice is hereby given that Plaintiff CTC Imports and Exports, by and through its undersigned counsel, L. Obioma Aham, Esquire; and Simon W. Tache, Esquire, in his own right, hereby appeal. . .", it was the actual intention of the parties to have the appeal taken on behalf of all three separate parties—L. Obioma Aham, Esquire, as counsel for Plaintiff, CTC Imports and Exports; L. Obioma

Aham, Esquire, *in his own right;* and Simon W. Tache, Esquire, in his own right.

The District Court's Order from which this appeal is taken denied a Motion for Reconsideration of an Order which imposed sanctions against three parties, *Plaintiff, CTC Imports and Exports; Simon W. Tache, Esquire; and L. Obioma Aham, Esquire, jointly and severally.* Accordingly, it is requested that this Honorable Court allow the appeal in this matter to be docketed as to all three of these parties, and accept for filing the Brief of CTC Imports and Exports and L. Obioma Aham, Esquire. *The factual development in Mr. Aham's Brief provides the Court with the information it needs* to fairly *consider the appeal on the merits.*

Thank you for your time and consideration.

/s/ Simon W. Tache
SIMON W. TACHE

SWT/dle

cc: L. Obioma Aham, Esquire
Mary E. Reeves, Esq.
James W. Johnson, Esq.
Faustino Mattioni, Esq.

APPENDIX J

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 90-1886

CTC, ET AL.,

Appellants

vs.

NIGERIAN PETROLEUM, ET AL.,

Appellees

MOTION OF APPELLANTS, L. OBIOMA AHAM, ESQUIRE, AND CTC IMPORTS AND EXPORTS, FOR ENLARGEMENT OF CONTENTS OF PRINCIPAL BRIEF

Appellants, L. Obioma Aham, Esquire, and CTC Imports and Exports, respectfully move this Court for permission to file a principal brief, the contents of which exceed the fifty (50) page limitation of Rule 28(g), of the Rules of Appellate Procedure and in support thereof, aver as follows:

1. The facts of this case are so extensive that Appellants cannot restate them without violating Rule 28(g).

2. The Appendix from which these facts are extracted covers four (4) volumes and over 2,000 pages.

3. *A full and complete discussion of the facts as contained in the Brief in chief of the Appellants is necessary for a comprehensive understanding of the factual and legal disputes involved in this case.*

4. Rule 28(g) provides in pertinent part that permission of the Court is necessary for the content of principal briefs to exceed fifty (50) pages.

5. The Appellants cannot comply with Rule 28(g) without prejudicing a full understanding of the disputed issues involved in the case.

6. *Appellant, Simon W. Tache, Esquire, joins in and supports the grant of permission to the undersigned Appellants to file a principal brief, the contents of which exceed fifty (50) pages.*

WHEREFORE, Appellants, L. Obioma Aham, Esquire, and CTC Imports and Exports, respectfully move this Honorable Court to grant them permission to file a principal brief, the contents of which exceed fifty (50) pages.

Respectfully submitted,

By: /s/ L. Obioma Aham
L. Obioma Aham, Esquire
5959 W. Loop S Suite 450
Bellaire, TX 77401-2402
(713) 666-3115

[Certificate of Service Omitted In This Printing]

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

90-1886

CTC IMPORTS AND EXPORTS

v.

NIGERIAN PETROLEUM CORPORATION, etc.

To: Clerk

1) Motion of Appellants, L. Obioma Aham, Esquire, and CTC Imports and Exports, for Enlargement of Contents of Principal Brief
2) Letter Dated February 7, 1991 from Simon W. Tache, Esquire, Concerning Whether the Notice of Appeal was Sufficient to Notice an Appeal on Behalf of L. Obioma Aham, Esquire

---

The foregoing Motion at (1) is denied. The appellant, or appellants if the Court so determines, shall file and serve a brief not exceeding fifty (50) pages in length within to (10) days of the date of this order.

The foregoing Letter at (2) is referred to the merit panel. Only the Court may make a conclusive determination concerning its jurisdiction. Pending the Court's determination concerning whether the notice of appeal was sufficient to notice an appeal on behalf of Mr. Aham, or whether the functional equivalent of a proper notice was timely filed, the brief referred to above will be accepted on behalf of Mr. Aham, as well as CTC.

For the Court,

/s/ Sally Mrvos
Clerk

Dated: Feb. 14, 1991

APPENDIX L

LAW OFFICE OF
FOREMAN, DEGEURIN & NUGENT
590 TWO HOUSTON CENTER
909 FANNIN AT MCKINNEY
HOUSTON, TEXAS 77010

August 19, 1991

Mr. Simon W. Tache
1700 Race Street
2nd Floor
Philadelphia, PA 19103

Re: CTC Imports & Exports v. Nigerian National Petroleum Corp. et al

Dear Simon:

I called your office twice last week and I have yet to get an answer back. I am sure that by now you must have received a copy of the letter from the Third Circuit asking Appellees to comment on whether Judge Bechtle abused his discretion by imposing sanctions on you. I am at a loss why the Court is trying to give defendants an opportunity to wiggle out of the cul de sac they've gotten themselves in. There is little doubt that they certainly had ample opportunity to comment or respond fully to our Motions to Reconsider pursuant to Rule 60(b) but failed to do so in detail.

I would want to get your comments on the correct interpretation of Rule 60(b) as I plan to file a response. Please send me a fax immediately. Of course if you wish to respond independently please let me know.

Sincerely,
/s/ L. Obii Aham

APPENDIX M

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 891815

CTC IMPORTS AND EXPORTS,

Plaintiff,

vs.

NIGERIAN PETROLEUM CORPORATION, GULF SHIPPING AGENCY (Nigeria, Ltd.), UNIVERSE MARITIME PEREAUS, CASA MARZELLI, MV "VYTINA", CAPTAIN STRATI NICHOLOS, RICE UNRUH, SHELTON RUSSEL, INDIVIDUALLY AND AS REPRESENTATIVE OF BRITISH PETROLEUM, AND BRITISH PETROLEUM,

Defendants.

STATE OF
COUNTY OF

AFFIDAVIT

Obi Aham, being duly sworn according to law, deposes and states as follows:

1. I am a member in good standing of the Pennsylvania Bar.

2. On March 10, 1989, I telephoned Simon W. Tache, Esquire, regarding the matter subject of this litigation.

3. Prior to contacting Simon W. Tache, Esquire, I conducted an independent investigation of the subject matter of this litigation.

4. On March 11, 1989, I referred the matter subject of this litigation to Simon W. Tache, Esquire.

5. Prior to referring this matter to Simon W. Tache, Esquire, I discussed the various documents and their authenticity with the Plaintiff and various other individuals knowledgeable in these matters.

6. Prior to referring this matter to Mr. Tache on March 11, 1989, it was my professional opinion that the documents in my possession vested title of the cargo subject of this litigation upon the Plaintiff.

7. Prior to referring this matter to Mr. Tache on March 11, 1989, it was my professional opinion, based on my independent investigation and discussions with the Plaintiff and other individuals and discussions with the Plaintiff and other individuals knowledgeable in the industry, that the Plaintiff was the rightful owner of the cargo subject of this litigation.

8. Although I first contacted Mr. Tache regarding his involvement with this matter on March 10, 1989, I did not actually forward the documents in question to him until Saturday, March 11, 1989.

9. Upon information and belief, on March 11, 1989, the M/V "Vytina", scheduled to arrive at the Gulf Coast, had been diverted to Philadelphia, and upon information and belief, the M/V "Vytina" was scheduled to arrive in Philadelphia on Sunday, March 12,, 1989.

10. Upon consultation with other attorneys in Philadelphia, I was advised to contact and obtain the services of Mr. Tache.

11. After forwarding the documents showing Plaintiff's title to the cargo of the M/V "Vytina", I assured Mr. Tache of the authenticity of the documents in question based on my own independent investigation, conversations with Plaintiff and consultation with other persons knowledgeable in the industry.

Obi Aham
(unsigned)

Sworn to and subscribed before me
this day of ,1990.
__________Notary Public

APPENDIX N

SIMON W. TACHE, P.C.
A PROFESSIONAL CORPORATION
OCEAN/LAW COMPLEX, SECOND FLOOR
1700 RACE STREET
PHILADELPHIA, PA 19103

April 19, 1989

L. Obioma Aham, Esquire
CTC Imports and Exports
9807 Stella Link
Houston, TX 77025

Re: CTC vs. M/T Vytina, et al

Dear Obii:

Enclosed pleasea find copies of the following:

1. Answer to Counterclaim of Addax;
2. Answer to Counterclaim of Palime Navigation; and
3. Answer to Defendants' Motion for Sanctions.

Very truly yours,

/s/ Simon W. Tache
SIMON W. TACHE

SWT/dle
Enclosures
CTC1.20

FEDERAL EXPRESS

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
No. 89-1815

CTC IMPORTS AND EXPORTS,
Plaintiff,
vs.

NIGERIAN PETROLEUM CORPORATION, GULF SHIPPING AGENCY (Nigeria, Ltd.), UNIVERSE MARITIME PIREAUS, CASA MARZELLI, MV "VYTINA", CAPTAIN STRATIS NICHOLAS, RICE UNRUH, SHELTON RUSSEL, INDIVIDUAL AND AS REPRESENTATIVE OF BRITISH PETROLEUM, AND BRITISH PETROLEUM,
Defendants.

PLAINTIFF'S ANSWER TO DEFENDANTS' MOTION FOR SANCTIONS

COMES NOW,Plaintiff, CTC IMPORTS AND EXPORTS, by and through its attorneys, and answers Defendants' Motion for Sanctions as follows:

1. Admitted.

2. Denied as stating a conclusion of law.

3. Admitted.

4. Denied as stating a conclusion of law.

5. Denied as stating a conclusion of law.

6. Denied as self-serving and conclusory.

7. Denied that there was any wrongful arrest of the "Vytina" and detention of its cargo by the Plaintiff.

8. Denied. Plaintiff has not unreasonably and vexatiously multiplied proceedings before this Court. Denied also as stating a conclusion of law.

WHEREFORE, Plaintiff requests this Honorable Court to deny Defendants' Motion for Sanctions.

By /s/ L. Obioma Aham
Simon W. Tache, Esquire
L. Obioma Aham, Esquire
ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
No. 89-1815

CTC IMPORTS AND EXPORTS,
Plaintiff,
vs.
NIGERIAN PETROLEUM CORPORATION, GULF SHIPPING AGENCY (Nigeria, Ltd.), UNIVERSE MARITIME PIREAUS, CASA MARZELLI, MV "VYTINA", CAPTAIN STRATIS NICHOLOS, RICE UNRUH, SHELTON RUSSEL, INDIVIDUALLY AND AS REPRESENTATIVE OF BRITISH PETROLEUM, AND BRITISH PETROLEUM,
Defendants.

MEMORANDUM OF LAW

I. HISTORY OF THE CASE

On Friday, March 10, 1989, at approximately 11:00 p.m., counsel (in Philadelphia) received a telephone call from the Plaintiff requesting counsel's immediate action to protect its interest in the cargo of oil loaded aboard the MV "Vytina". On March 11, 1989, (a Saturday), copies of documents showing Plaintiff's clear title to the cargo of the MV "Vytina" were faxed to counsel. On their face and in view of counsel's experience with cargo documentation, he reasonably concluded that the Plaintiff was in fact the rightful owner of the cargo aboard the vessel, which, although scheduled to proceed to the U.S. Gulf Coast, was instead docking in Philadelphia. Having ascertained from the Plaintiff the name of the seller of the oil, the documents pertaining to the oil, the name of the vessel transporting the cargo, and the documents supporting Plaintiff's title to the cargo, counsel immediately launched an investigation to determine the location of the vessel. Counsel was assured by the Plaintiff that it was in fact the assignee and consignee of the caro aboard the "Vytina".

Armed with this information, and aware that it would take less than 24 hours to discharge a crude oil vessel, counsel spent the rest of Saturday and Sunday preparing the necessary court papers. On Sunday, March 12, 1989, counsel obtained the necessary Writ, and on Monday, March 13, 1989, the vessel and its cargo were seized.

In their Motion, the Defendants allege that the oil aboard the MV "Vytina" was purchased by Addax. However, to this date, Addax had not produced any evidence to show that it was in fact the buyer of the oil in question. Addax was not a consignee of the oil and does not have any standing to assert any claim over that cargo. (See Plaintiff's Brief in response to Defendant's Motion for Summary Judgment.)

The Defendants argue that a reasonable inquiry by a competent attorney would have uncovered substantial inconsistencies in Plaintiff's Petition. Yet the Defendants fail to establish what those inconsistencies are. The mere fact that Plaintiff's bill of lading was dated February 26, 1989, and the vessel allegedly sailed on February 24, 1989, is not so fatal as to destroy Plaintiff's title. In fact, it can be argued that a discrepancy in the dates was the result of conspiracy on the part of the Defendants to highjack and deprive Plaintiff of the cargo.

Contrary to the Defendants' position, the Captain did not confirm that the documentation offered by Addax was genuine. In fact, since the taking of the deposition of the Captain, it is now clear that the Defendants have produced three separate bills of lading, none of which is consistent with the other. (Copies of those bills of lading are attached hereto as Exhibit "1".) The Captain is an interested party, and his testimony must be viewed with suspect. It is only after the depositions of the party actually buying the oil from the Nigerian National Petroleum Corporation and other witnesses have been taken, that the question of which of the parties is the rightful owner of this cargo can be answered. Counsel for the Plaintiff made more than a reasonable inquiry prior to filing this claim. In fact he was in possession of documents which, on their face, clearly establish Plaintiff's title to the cargo. Until the Defendants and/or any other interested parties can produce all of the documents that constitute title to the oil, it will not be clear as to which documents are false.

II. ARGUMENT

A. THE PLAINTIFF ACTED IN GOOD FAITH

In order to impose sanctions upon the Plaintiff or its counsel, the Court must determine that counsel acted in bad faith. *See, Alyeska Pipe Line Service Co. vs. Wilderness Society* 421 U.S. 421 (1975); *Hall vs. Cole, 412 U.S. 1, 15 (1973).* Neither counsel nor Plaintiff acted in bad faith, vexatiously, wantonly, or for oppressive reasons. In fact, the actions taken under emergency circumstances were proper and made to protect the proprietary rights of the Plaintiff.

B. COUNSEL FOR PLAINTIFF MADE A REASONABLE INQUIRY SUFFICIENT TO FORM A REASONABLE BASIS FOR THE PLAINTIFF'S CLAIM.

A Court will not impose sanctions against a party unless it appears that no reasonable inquiry into the facts which constitute the basis of the claim was made to form a reasonable belief as to the validity of the allegations in the pleadings. *See, Eastway Construction Corp. vs. City of New York,* 762 F.2d, 243 (2nd Cir. 1985). The documents delivered to the Plaintiff by the Nigerian authorities contained the necessary stamps and items such that a reasonable person would conclude that the party whose name appears in those documents is in fact entitled to the oil aboard the M/V "Vytina". Since these documents were faxed to counsel on Saturday, he could not, of course, call the Nigerian authorities to question them regarding their authenticity. In fact, none of the documents presented by the Defendants carry any official stamp of the Nigerian authorities.

It is clear that no one would purchase oil from the Nigerian National Petroleum Corporation without the documents carrying that agency's stamp. In his deposition, the Captain testified that when he signed the bills of lading and other documents, he delivered them to other individuals, unknown to him, and who, in his opinion, were not agents of the Nigerian National Petroleum Corporation. It seems rather bizarre that a captain of a ship would sign over documents to unknown individuals. Suffice it to say that this act would permit a frauder to lay claim to Twenty Million Dollars worth of cargo. This conduct, by itself, supports Plaintiff's contention that there may be a conspiracy by the Defendants designed to cloud Plaintiff's title. The oil carried by the "Vytina" is Bonny light as indicated in the bill of lading in possession of the Plaintiff. The tonnage is identical, the name of the vessel is identical, the name of the captain is identical and the vessel proceeded to Philadelphia instead of the U.S. Gulf. Under the circumstances, it cannot be said that "it is obvious that counsel made little or no factual investigation". Public documents indicate that the vessel was in Bony Nigeria between the 20th and the 28th of February, 1989. (See Exhibit "2"). In addition to Plaintiff's statements, there was clear documentation to establish this claim, and all the evidence clearly established that Plaintiff is the rightful owner of the oil aboard the M/V "Vytina". Moreover, since the Plaintiff's contract was a re-assignment, the financial arrangements, the charter party and the purchase agreement would have been made by the assignor. In fact, payment was not to be made until after delivery of the oil.

C. THE DEFENDANTS HAVE NOT ESTABLISHED A BASIS FOR SANCTIONS UNDER 28 U.S.C. § 1927

Under Section 1927:

> Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiples the proceedings in any case unreasonably and vexatiously may be required by the court to so satisfy personally the excess costs, expenses, and attorneys' fees, reasonably incurred because of such conduct.

Sanctions under Section 1927 can only be supported when the actions of an attorney are so completely without merit as to warrant a finding that the attorney acted with an improper purpose and in complete bad faith. *Kamen vs. American Telephone and Telegraph Company*, 791 F.2d. 1006, 1010, (2nd Cir. 1986). Counsel for the Defendants do indeed put in question their own credibility in alleging that counsel for the Plaintiff in this matter acted with improper purpose or in complete bad faith.

According to the Captain's testimony, he signed the cargo documents on February 24, 1989. As of March 24, 1989, the Defendants had not produced one original of those documents. In fact, if this case has been prolonged, it is because of the Defendants' inability to produce their documents. One can only infer that the Defendants did not in fact have the documents of title to the cargo aboard the M/V "Vytina" when this action was commenced. Having delayed the production of their documents, the Defendants cannot blame the continuation of this action upon the Plaintiff. It is clear that the Defendants' approach has been to establish that Plaintiff's documentation is false and assume title to the cargo even if their own documents are false.

While the burden of proving its case is on the Plaintiff, the Defendants must also come before this Court with clean hands. The purpose of Plaintiff's insistence on seeing Defendants' documents is to ensure that Defendants are in fact the rightful owner of that oil. The Plaintiff has not multiplied the proceedings, and the Plaintiff nor its counsel has acted in complete bad faith. Indeed, it is the Defendants that have protracted the proceedings through intimidation (newspaper articles) and character assassinations.

WHEREFORE, Defendants' Motion for Sanctions must be denied.

Respectfully submitted,

By /s/ L. Obioma Aham
Simon W. Tache, Equire
L. Obioma Aham, Esquire
ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
No. 89-1815

CTC IMPORTS AND EXPORTS,
Plaintiff,

vs.

NIGERIAN PETROLEUM CORPORATION, GULF SHIPPING AGENCY (Nigeria, Ltd.), UNIVERSE MARITIME PIREAUS, CASA MARZELLI, MV "VYTINA", CAPTAIN STRATIS NICHOLOS, RICE UNRUH, SHELTON RUSSEL, INDIVIDUALLY AND AS REPRESENTATIVE OF BRITISH PETROLEUM, AND BRITISH PETROLEUM,
Defendants.

[Certificate of Service Omitted in this Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
No. 89-1815

CTC IMPORTS AND EXPORTS,
Plaintiff,
vs.
NIGERIAN PETROLEUM CORPORATION, GULF SHIPPING AGENCY (Nigeria, Ltd.), UNIVERSE MARITIME PIREAUS, CASA MARZELLI, MV "VYTINA", CAPTAIN STRATIS NICHOLOS, RICE UNRUH, SHELTON RUSSEL, INDIVIDUALLY AND AS REPRESENTATIVE OF BRITISH PETROLEUM, AND BRITISH PETROLEUM,
Defendants.

EXHIBITS TO PLAINTIFF'S ANSWER TO DEFENDANTS' MOTION FOR SANCTIONS

Although the Plaintiff had indicated that Defendants have produced three different bills of lading, it now appears that there are four different bills of lading. (See Exhibit "1".)

Perhaps the most disturbing fact about these documents is that the so-called copies are completely different from the original. At his deposition, the Captain testified to have stamped these documents with the ship's stamp on February 24, 1989. Yet, only one non-negotiable copy of the bill of lading carriers the ship's stamp. One of the non-negotiable copies is dated December 30, 1988, instead of February 24, 1989. There is significant discrepancy in the bills of lading produced by the Defendants to invoke the inference of a recent fabrication. These discrepancies are so obvious upon casual examination as to warrant further elaboration.

Respectfully submitted,

By /s/ L. Obioma Aham

Simon W. Tache, Esquire
L. Obioma Aham, Esquire
ATTORNEYS FOR PLAINTIFF

APPENDIX O

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 89-1815

CTC IMPORTS & EXPORTS

Plaintiff

v.

M/T VYTINA, et al.

Defendants

REPLY MEMORANDUM

Sohio Supply Company (hereinafter "Sohio") hereby replies to plaintiff's answering brief which was filed in response to the moving defendants' Motion for Sanctions.

I. INTRODUCTION

In the moving papers, defendants Sohio, Addax Overseas S.A., Palmine Navigation Company and Rice Unruh Jointly move that this Court award sanctions in the form of counsel fees, cost and expenses to the move defendants because of the conduct of plaintiff and its two lawyers, Simon Tache,, Esquire and L.O. Aham, Esquire. The moving papers centered around the relevant legal principles concerning sanctions as underscored by this Court's inherent powers, Rule 11 of the Federal Rules of Civil Procedure, and 28 U.S.C. §1927.

The answering brief filed is captioned "Plaintiff Answer to Defendants Motion for Sanctions". However, the brief is in essence a rebuttal apparently on the behalf of the Philadelphia counsel for plaintiff, Simon Tache and there does not appear to be any specific position set forth concerning conduct of the plaintiff and its other counsel, L.O. Aham, although Mr. Aham signed the brief. As such, Sohio avers that there is no opposition to the Motion and there-

fore the Motion should be granted as against L.O. Aham and the plaintiff as being without opposition.

Sohio will set forth below its response to the substance of the answering memorandum and address the relevant points.

APPENDIX P

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 89-1815

CTC IMPORTS AND EXPORTS,
Plaintiff,
vs.
NIGERIAN PETROLEUM CORPORATION, GULF SHIPPING AGENCY (Nigeria, Ltd.), UNIVERSE MARITIME PIREAUS, CASA MARZELLI, MV "VYTINA", CAPTAIN STRATIS NICHOLOS, RICE UNRUH, SHELTON RUSSEL, INDIVIDUALLY AND AS REPRESENTATIVE OF BRITISH PETROLEUM, AND BRITISH PETROLEUM,
Defendants.

NOTICE OF MOTION

TO: ALL COUNSEL OF RECORD

PLEASE BE ADVISED that the attached Motion for Reconsideration and for Relief will be filed with the Court, pursuant to Local Rules of Procedure, on May 9, 1990. You have until May 22, 1990, to respond.

SIMON W. TACHE, P.C.

By: /s/ Simon W. Tache
SIMON W. TACHE
1700-06 Race St., Second Floor
Philadelphia, PA 19103
(215) 567-4700

Dated: May 9, 1990

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 89-1815

CTC IMPORTS AND EXPORTS,
Plaintiff,
vs.
NIGERIAN PETROLEUM CORPORATION, GULF SHIPPING AGENCY (Nigeria, Ltd.), UNIVERSE MARITIME PIREAUS, CASA MARZELLI, MV "VYTINA", CAPTAIN STRATIS NICHOLOS, RICE UNRUH, SHELTON RUSSEL, INDIVIDUALLY AND AS REPRESENTATIVE OF BRITISH PETROLEUM, AND BRITISH PETROLEUM,
Defendants.

MOTION FOR RECONSIDERATION AND FOR RELIEF FROM ORDER OF APRIL 27, 1990

COMES NOW, Petititioner, Simon W. Tache, Esquire, and requests reconsideration of and relief from the Court's Order of April 27, 1990, and in support thereof, avers as follows:

1. On April 27, 1990, this Court entered an order imposing sanctions on the Petitioner. (A copy of this Order is attached hereto as Exhibit "1".)

2. Under the facts of this case, it was error to impose sanctions against the Petitioner.

3. On March 10, 1989, Obi Aham, Esquire, telephoned me regarding the matter subject of this litigation.

4. On March 10, 1989, Mr. Aham advised me that he had conducted an independent investigation of the subject matter of this litigation, and Plaintiff was in possession of the necessary title documentation.

5. On March 11, 1989, Mr. Aham requested my assistance in the handling of the matter subject of this litigation.

6. Mr. Aham advised that prior to requesting my assistance in the handling of this matter, he discussed the various documents and their authenticity with the Plaintiff and other individuals knowledgeable in crude oil transactions.

7. Mr. Aham advised that prior to requesting my assistance in the handling of this matter of March 11, 1989, it was his professional opinion that the documents in his possession vested title of the cargo subject of this litigation upon the Plaintiff.

8. Mr. Aham advised that prior to requesting my assistance in the handling of this matter of March 11, 1989, it was his professional opinion, based on his independent investigation and discussions with the Plaintiff and other individuals knowledgeable in the industry, that the Plaintiff was the rightful owner of the cargo subject of this litigation.

9. Although Mr. Aham contacted me regarding my involvement with this matter on March 10, 1989, I did not actually receive the documents in question until Saturday, March 11, 1989.

10. On March 11, 1989, the documents of Plaintiff's entitlement to the cargo subject of this litigation were faxed to me.

11. After forwarding the documents showing Plaintiff's title to the cargo of the M/V "Vytina", Mr. Aham assured me of the authenticity of the documents in question based on his own independent investigation, conversations with Plaintiff and consultation with other persons knowledgeable in the industry.

12. When I received the documents on March 11, 1989, I immediately consulted the maritime sources and determined that the M/V "Vytina" would be in Philadelphia on March 11, 1989.

13. On March 11, 1989, I telephoned the Plaintiff, and he assured me that the documents were authentic and that

the Plaintiff was the proper owner of the cargo aboard the M/V "Vytina".

14. *Having satisfied myself that the documents did indeed establish Plaintiff's title to the cargo aboard the vessel, I initiated the proceedings for the arrest of the vessel on March 11, 1989.*

15. On March 17, 1989, the Captain was deposed. (Relevant portions of the deposition transcript of Captain Nikolaos Stratis are attached hereto as Exhibit "2" and hereinafter referred to as "D.T.-N.S.")

16. The Captain testified that the vessel started loading the Nigeria on February 20, 1989, and completed loading on February 24, 1989. (D.T.-N.S. p. 41(13))

17. Between December 14, 1988, and February 20, 1989, the vessel had changed registry from Greece to Cyprus (D.T.-N.S. 45(11))

18. The Captain did not know of Defendant Addax nor had he had any communication with Addax before the vessel went to Nigeria, during its stay in Nigeria, or before the vessel left Nigeria.

19. Although the vessel left Nigeria on February 24, 1989, the Captain did on get orders instructing him to change course towards the Gulf Coast to Marcus Hook, Philadelphia. (D.T.-N.S. 51(2))

20. The Captain testified that since the ship changed flags he used a stamp other than the one being used prior to the change in registry. (D.T.-N.S. 92(23)-93(2))

21. When the vessel left Bonny, Nigeria, on February 24, 1989, the Captain did not know that the vessel was headed for Marcus Hook, Philadelphia. (D.T.-N.S. 113(22)-114(1))

22. On February 24, 1989, when the Captain signed the Bill of Lading, the destination of the vessel was the U.S. Gulf. (D.T.-N.S. 140(1))

23. When the vessel left Nigeria on February 24, 1989, it was to head towards Cape Palmos waiting order for its destination. (D.T.-N.S. 128(12))

24. Cape Palmos is what is known as a deviation point. (D.T.-N.S. 208(23))

25. On March 16, 1989, the deposition of Dr. John Indakwa, representative of Plaintiff, CTC, was taken. (Relevant portions of this deposition transcript are attached hereto as Exhibit "3", hereinafter referred to as "D.T.-J.I.")

26. The Plaintiff testified that he was advised by the Nigerian authorities that the ship was ready and that as a result he went to Nigeria. (D.T.-J.I. 87(11)-88(11))

27. The Plaintiff arrived in Nigeria on February 22, 1989. (D.T.-J.I. 103(6))

28. While in Nigeria, the Plaintiff saw the vessel M/V "Vytina" loading offshore. (D.T.-J.I. 114(1))

29. While in Nigeria, the Plaintiff could see "M/V Vytina" on the vessel loading the cargo in question. (D.T.-J.I. 118(21))

30. *Following the depositions of Both Mr. Indakwa and the Captain, I requested Mr. Aham to enter is appearance for the Plaintiff because of my concern regarding the authenticity of Plaintiff's documents.*

31. On March 21, 1989, Mr. Aham entered his appearance for the Plaintiff.

32. *After the deposition of the Captain on March 17, 1989, my role was relegated to that of local counsel, and consultation on procedural matters.*

33. Mr. Indakwa continued to assure me that he was in the process of obtaining authentication of his documents from the Nigerian authorities.

34. Unable to contact Mr. Indakwa and to receive the documents he had promised, I decided to withdraw com-

pletely as local counsel for the Plaintiff on November 13, 1989.

35. *For all practical purposes, my direct involvement in this matter was terminated on March 17, 1989, following the Captain's deposition.*

WHEREFORE, I respectfully request that the Court reconsider and relieve me of its Order of April 27, 1989.

SIMON W. TACHE, P.C.
By /s/ Simon W. Tache
Simon W. Tache, Equire
Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 89-1815

CTC IMPORTS AND EXPORTS,
Plaintiff,
vs.
NIGERIAN PETROLEUM CORPORATION, GULF SHIPPING AGENCY (Nigeria, Ltd.), UNIVERSE MARITIME PIREAUS, CASA MARZELLI, MV "VYTINA", CAPTAIN TRATIS NICHOLOS, RICE UNRUH, SHELTON RUSSEL, INDIVIDUALLY AND AS REPRESENTATIVE OF BRITISH PETROLEUM, AND BRITISH PETROLEUM,
Defendants.

MEMORANDUM OF LAW

I. COUNSEL'S CONDUCT UNDER THE FACTS OF THIS CASE DOES NOT VIOLATE RULE 11.

Pursuant to Rule 60(b), undersigned counsel moves this Honorable Court for reconsideration and relief from the Order of April 27, 1990, imposing on him. Rule 60(b) provides:

> . . .on motion and on such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake . . ., or excusable neglect; . . . operation of the judgment.

A. Applicable Facts

On March 10, 1989, Obi Aham, Esquire, telephoned me regarding the matter subject of this litigation. He advised me that he had conducted an independent investigation of the subject matter of this litigation, and that Plaintiff was in possession of the necessary title documentation. Mr. Aham then requested my assistance as local counsel in the handling of this matter. He assured me that prior to requesting my assistance in the handling of this matter, he discussed the various documents and their authenticity with the Plaintiff and other individuals knowledgeable in crude oil transactions. He advised that prior to requesting my assistance in the handling of this matter on March 11, 1989, it was his processional opinion that the documents in his possession vested title of the cargo subject of this litigation upon the Plaintiff. He further stated that it was his professional opinion, based on his independent investigation and discussions with the Plaintiff and other individuals knowledgeable in the industry, that the Plaintiff was the rightful owner of the cargo subject of this litigation.

Although Mr. Aham contacted me regarding my involvement with this matter on March 10, 1989, I did not actually receive the documents in question until Saturday, March 11, 1989. On March 11, 1989, the documents of Plaintiff's entitlement to the cargo subject of this litigation were faxed to me. After forwarding the documents showing Plaintiff's title to the cargo of the M/V "Vytina", Mr. Aham assured me of the authenticity of the documents in question based on his own independent investigation, conversations with Plaintiff and consultation with other persons knowledgeable in the industry.

When I received the documents on March 11, 1989, I immediately consulted the maritime sources and determined that the M/V "Vytina" would be in Philadelphia on March 11, 1989.

On March 11, 1989, I telephoned the Plaintiff, and he assured me that the documents were authentic and that the Plaintiff was the proper owner of the cargo aboard the M/V "Vytina". *Having satisfied myself that the documents did indeed establish Plaintiff's title to the cargo aboard the vessel, I initiated the proceedings for the arrest of the vessel on Saturday, March 11, 1989.* On Monday, March 13, 1989, I contacted the Nigerian Embassy in Washington, D.C., and was advised that matters pertaining to the sale of crude oil are handled directly by the home government. I made several unsuccessful efforts to contact the Nigerian National Petroleum Corporation. In any event, I was unable to contact any of the authorities, and I was satisfied with the assurance of the Plaintiff and counsel, Mr. Aham.

On March 17, 1989, the Captain was deposed. (Relevant portions of the deposition transcript of Captain Nikolaos Straitis are attached hereto as Exhibit "2" and hereinafter referred to as "D.T.-N.S.") The Captain testified that the vessel started loading in Nigeria on February 20, 1989, and completed loading on February 24, 1989. (D.T.-N.S. p. 41(13)) Between December 14, 1988, and February 20, 1989, the vessel had changed registry from Greece to Cyprus (D.T.-N.S. 45(11)) The Captain did not know of Defendant Addax nor had he had any communication with Addax before the vessel went to Nigeria, during its stay in Nigeria, or before the vessel left Nigeria. Although the vessel left Nigeria on February 24, 1989, the Captain did on get orders instructing him to change course towards the Gulf Coast to Marcus Hook, Philadelphia. (D.T.-N.S. 51(2)). The Captain testified that since the ship changed flags he used a stamp other than the one being used prior to the change in registry. (D.T.-N.S. 92(23)-93(2)). When the vessel left Bonny, Nigeria, on February 24, 1989, the Captain did not known that the vessel was headed for Marcus Hook, Philadelphia. (D.T.-N.S. 113(22)-114(1)). On February 24, 1989, when the Captain signed the Bill of Lading, the destination of the vessel was the U.S. Gulf. (D.T.-N.S. 140(1)). When the vessel left Nigeria on February 24, 1989, it was to head towards Cape Palmos waiting order for its destination. (D.T.-N.S. 138(12)). Cape Palmos is what is known as a deviation point. (D.T.-N.S. 208(23)).

On March 16, 1989, the deposition of Dr. John Indakwa, representative of Plaintiff, CTC, was taken. (Relevant portions of this deposition transcript are attached hereto as Exhibit "3", hereinafter referred to as "D.T.-J.I.") The Plaintiff testified that he was advised by the Nigerian authorities that the ship was ready and that as a result he went to Nigeria. (D.T.-J.I. 87(11)-88(11)). The Plaintiff arrived in Nigeria on February 22, 1989. (D.T.-J.I. 103(6)). While in Nigeria, the Plaintiff saw the vessel M/V "Vytina" loading offsore. (D.T.-J.I. 114(1)). While in Nigeria, the Plaintiff could see "M/V Vytina" on the vessel loading the cargo in question. (D.T.-J.I. 118(21)).

Following the depositions of both Mr. Indakwa and the Captain, I requested Mr. Aham to enter his appearance for the Plaintiff because of my concern regarding the authenticity of Plaintiff's documents. On March 21, 1989, Mr. Aham entered his appearance for the Plaintiff. After the deposition of the Captain on March 17, 1989, my role was relegated to that of local counsel, and consultation on procedural matters. Mr. Indakwa continued to assure me that he was in the process of obtaining authentification of his documents from the Nigerian authorities. Unable to contact Mr. Indakwa and to receive the documents he had promised, I decided to withdraw completely as local counsel for the Plaintiff on November 13, 1989. For all practical purposes, my direct involvement in this matter was terminated on March 17, 1989, following the Captain's deposition.

B. Application of Rule 11

As correctly pointed out by the Court, the Third Circuit applies a test of "reasonableness under the circumstances" to determine whether an attorney has filed a pleading in violation of Rule 11. *Nappier vs. Thirty or More Unidentified Agents*, 855 F.2d 1080, 1090-91 (3rd Cir. 1988). In applying the reasonableness under the circumstances standard, the Court should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading was submitted. *Eavenson, Auchmuty and Greenwald vs. Holtzman*, 775 F.2d 535 (3rd Cir. 1985); *Teamsters Local Union No. 430 vs. Cement Express, Inc.*, 841 F.2d 66, 68 (3rd Cir. 1988).

The Court should consider four factors in determining the reasonableness of the attorney's pre-filing inquiry:

1) The amount of time available for conducting relevant factual investigation;
2) The necessity for reliance on a client for factual information;
3) Whether the case was referred to the signer by another member of the bar; and
4) The plausibility of the legal position advocated.

Maryanne Densiero, Inc. vs. Lingle, 847 F.2d 90, 95 (3rd Cir. 1988).

1. Relevant Facts at Time of Filing of Compaint

As set out in the facts enumerated above, counsel was contacted by a referring attorney on Friday, March 10, 1989, at 11:00 p.m. to assist in the arrest of the M/V "Vytina". On March 11, 1989, counsel received documents which appeared to be fully authenticated by the Nigerian authorities. Those documents clearly show that the Plaintiff was indeed the owner of the cargo aboard the M/V "Vytina". In addition, counsel was assured by the referring attorney that the documents had been verified by other individuals in Houston, Texas, and were deemed to be authentic. Counsel then telephoned Plaintiff and was assured that the Plaintiff was in port in Nigeria at the time the vessel was loaded and that the documents were handed to him by the Nigerian authorities during that visit.

The vessel was due in Philadelphia on March 11, 1989, which was a Saturday. Counsel knew that tankers of this type generally discharged their cargo within 15 to 24 hours. Under this understanding, the vessel would have discharged its cargo and left port during the weekend. Although counsel did not have much time to initiate the arrest of the vessel, he conducted a reasonable inquiry and concluded that based on the facts at the time of the filing, the Plaintiff had a claim to the cargo of the M/V "Vytina". Counsel worked all day Saturday, and at 6:30 p.m. filed the Complaint in this matter.

Counsel not only relied on the documents provided by the Plaintiff, but on assurances by both the Plaintiff and the forwarding attorney that the documents were indeed accurate and authentic. Counsel also did more than rely on Plaintiff and forward counsel. He contacted the Nigrian authorities on March 13,, 1989, but was unsuccessful in obtaining any other information which would have altered the opinion formed after reasonable inquiry. Reliance alone on forwarding counsel may in certain circumstances satisfy the duty of reasonable inquiry. See, *Unioil, Inc. vs. E. F. Hutton Co.*, 802 F.2d 1080 (9th Cir. 1986). The emergency surrounding the conduct of counsel cannot be overemphasized.

Although the name of the master and the seal of the vessel in the ship's Bill of Lading were different from those in possession of the Plaintiff, this fact was not available to counsel until March 17, 1989, when the Captain was deposed. Moreover, the Captain testified that since the ship changed flags, he used a stamp other than the one being used prior to the change in registry. (See Exhibit "2" at D.T.-N.S. 92(23)-93(2)). Although the vessel left Nigeria on February 24, 1989, and Plaintiff's Bill of Lading was executed on February 26, 1989, *this fact by itself is of no significant consequence.* The Captain testified that prior to leaving Nigeria the Captain did not know that the vessel was headed for Philadelphia nor did he know that Addax was the owner of the cargo. Moreover, it is not unusual for a vessel to load cargo and head in a general direction before receiving instructions from the owners of the vessel. In fact, it appears that this is exactly what happened in this case since the Captain was headed towards Cape Palmos, a deviation point, where he would receive orders for a specific destination. (*Id.* at 128(12); 208(23)). Again, these facts were unknown to counsel until March 17, 1989.

At the conclusion of the Captain's deposition, I was concerned that the Plaintiff may indeed be the rightful owner to the cargo of the M/V "Vytina". I therefore, requested Mr. Aham to enter his appearance for the Plaintiff. The Plaintiff continued to insist that his documents were authentic and assured me that he was in the process of obtaining authentification of his documents from the Nigerian authorities. My involvement with this matter practically ceased on March 17, 1989. To the extent that any action on the part of counsel under the circumstances of these facts constitutes neglect, that neglect is excusable.

For these reasons, I respectfully request that the Court reconsider and relieve me of its Order of April 27, 1989.

Respectfully submitted,
SIMON W. TACHE, P.C.
By: /s/Simon W. Tache, Esquire
Simon W. Tache, Esquire
Petitioner

APPENDIX Q

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 90-1886

CTC IMPORTS EXPORTS, et al.
Appellants
vs.
NIGERIAN NATIONAL PETROLEUM CORP., et al.
Appellees

BRIEF OF APPELLANTS CTC IMPORTS and EXPORTS and L. OBIOMA AHAM, ESQUIRE

[Table of Contents and Table of Authorities Omitted in this Printing]

REQUEST FOR ORAL ARGUMENT

Pursuant to Third Circuit Court Rule 12(6), Appellants respectfully request oral argument. The judgment and Order of April 27, 1990, imposed severe, chilling and financially debilitating sanctions of over $250,142.68 on the President of CTC Imports and Exports, Dr. John Indakwa, in his individual capacity, and his attorneys, Simon w. Tache, Esquire and L. Obioma Aham, Esquire. Appellants only "crime" was the bringing of a suit which a sound and unbiased knowledge of the circumstances surrounding this case would have revealed to be nothing other than a reasonably valid, or at the very least, colorable claim, well-grounded in fact and law.

The imposition of sanctions on the Appellants contravened long-established doctrines, articulated and emphasized time and again by the Third Circuit, that the imposition of sanctions under Rule 11 should only be warranted where no reasonable basis in fact or law can be advanced in support of the commencement of a suit. *Teamsters Local Union No. 430 v. Cement Exp., Inc.*, 841 F.2d 66, 68 (3d Cir. 1988); Fed. Rule Civ. Proc. 11.

Likewise, the imposition of ruinous sanctions in this case for alleged violation of 28 U.S.C. 1927 constitutes an abuse of discretion on the part of the District Court. For such an imposition thwarts not only the clear expression of the letter and spirit of that statutory provision, but also the oft-stated dictates of this Honorable Court that such sanctions be allowed only in the most extreme cases involving the exercise of willful or intentional bad faith effected in a manner constituting an egregious or a studied abuse or disregard of the orderly process of law. *Ford v. Temple Hospital*, 790 F.2d 342, 347 (3d Cir. 1986).

The imposition of such debilitating sanctions under the circumstances of this case lacked even the most disguised appearance of the above-stated rules and was prompted by strong bias and prejudice on the part of the District Court against Appellants and their case. Appellants submit that the decision below constitutes a clear case of manifest injustice. And as will be reflected in the supporting Brief of Appellants, the issues raised herein have broad consequences beyond this case, and this Honorable Court's consideration of them will most significantly be aided by oral argument.

STATEMENT OF SUBJECT MATTER APPELLATE JURISDICTION

Jurisdiction in the District Court was based on the subject matter: Admiralty, and on Diversity of Citizenship.

The District Court entered its Order on April 27, 1990 and denied Appellants' timely Motion for Reconsideration on October 22, 1990. A timely Notice of Appeal was filed on November 21, 1990. This Honorable Court's jurisdiction rests on 28 U.S.C. § 1291.

ISSUES

1. Whether the District Court's finding that CTC Imports and Exports' case was frivolous from the start, thus warranting the imposition of Rule 11 sanctions on Appellant, Simon W. Tache, Esquire, constitutes an abuse of discretion under the facts of this case and law governing the imposition of sanctions on attorneys?

2. Whether the District Court abused its discretion in imposing sanctions on Appellant, L. Obioma Aham, Esquire, for entry of appearance and conduct which allegedly multiplied the proceedings vexatiously and in bad faith, in violation of the provisions of § 1927 of 28 U.S.C.?

STATEMENT OF CASE

1. Proceedings and Rulings Below

This action was brought in Admiralty for the arrest of the vessel "M/V Vytina" on March 11, 1989, by Plaintiff, Dr. John Indakwa, in his capacity as President of CTC Imports and Exports, a Texas Corporation, based in Houston, Texas, in the United States District Court for the Eastern District of Pennsylvania. The "Vytina" was carrying approximately 773,398 barrels of Nigerian (Bonny light) sweet crude oil. [J.Appx. 31a; 114a] The vessel was arrested on March 13, 1989, by the U.S. Marshals. The present Defendants in this case are: The Nigerian National Petroleum Corporation (NNPC), Gulf Shipping Agency (Nigeria), British Petroleum[1] (BP), and/or its subsidiary corporation Sohio Supply Company ("Sohio"), Addax Overseas, S.A. ("Addax"), and Palime Navigation Company (Palime.[2]

The District Court, (the Honorable Norma Shapiro presiding) meeting in an emergency proceeding called by the Defendants on March 15, 1989, vacated the arrest of the "Vytina" by an agreement reached by both parties. [J.Appx. 3a] On March 21, 1989, when Plaintiff's attorneys can before the Honorable Louis Bechtle, in whose court the case was originally filed, to enforce Judge Shapiro's Order, the request was denied in part. [J.Appx. 4a] On March 27, 1989, the Defendants filed a Motion for Summary Judgment and for Sanctions against Plaintiff and his attorneys. The Motion was heard on the 31st of March. [J.Appx. 57a, 154a] The District Court, granted a dismissal of Plaintiff's suit for failure to comply with the requirements of verification of a Complaint pursuant to Admiralty Rule of Procedure C(2). [J.Appx. 5a]

On April 27, 1990, over one year after the case commenced, the Honorable Judge Bechtle granted the Defendants' Motion for Summary Judgment, dismissing the claim on the merit. [J.Appx. 19a][3] Judgment was entered on the verdict on May 2, 1990. [J.Appx. 20a] Further, the Court opined that in bringing the suit, Simon W. Tache, Esquire, had violated Rule 11 of the Federal Rules of Civil Procedure dealing with commencement of frivolous suits. [J.Appx. 18a] The Court added that L. Obioma Aham, Esquire, by entering his appearance in the case, continued a frivolous suit, and that such conduct in entering was so abusive and dilatory to the judicial process as to necessitate sanctions under 28 U.S.C. § 1927. [J.Appx. 18a] The District Court also sanctioned the Plaintiff, John Indakwa, in his individual capacity. [J.Appx. 18a] Liability for sanctions was said to be joint and several. [J.Appx. 18a]

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[1] Plaintiff sued British Petroleum after he learned that the "Vytina" had diverted its route from the original port of destination of U.S. Gulf to BP's loading port of Marcus Hook, Pennsylvania. The attorneys for BP after consenting voluntarily to jurisdiction of the District Court as BP, later filed a Motion to dismiss Plaintiff's Complaint on the theory that Plaintiff named the wrong party—BP, instead of Sohio.

[2] Plaintiff's original Complaint filed with the information available at the time, named the following Defendants: Nigerian National Petroleum Corp.; Gulf Shipping Agency (Nigeria) Ltd., Universe Maritime Pireus, Casa Marzelli, (Capt.) Stratis Nicholos, British Petroleum and Mr. Sheldon Russel in individual capacity and as Representative of BP.

[3] The Court denied a Motion for Summary Judgment filed by Third-Party Defendants, comprised mostly of CTC's Investors. [J.Appx. 19a] No ruling was handed out on Plaintiff's attorneys' (Mr. Tache's and

On May 9, 1990, Simon W. Tache, Esquire, filed a Motion for Reconsideration and for Relief from the April 27, 1990, Order imposing sanctions on him. [J.Appx. 271a-323a] L. Obioma Aham, Esquire, Likewise filed a similar Motion on July 2, 1990. [J.Appx. 1066a-1227a] On October 22, 1990, the District Court denied jointly the Motions without an opinion. [J.Appx. 347a] By so doing, the District Court refused to set aside the numerous errors of law and fact pointed out to it. This appeal followed. [J.Appx. la] The entire facts of this case are set forth in detail below.

STATEMENT OF FACTS

Appellant, L. Obioma Aham, Esquire, was approached for the first time about this case on the evening of March 8, 1989, by Plaintiff, Dr. John Indakwa, President of CTC imports and Exports, a Texas corporation located in Houston. [J.Appx. 1069a] By that time, the M/V "Vytina" was speeding ahead and about to reach its destination to off-

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Mr. Aham's Motion to Withdraw filed in November and December of 1989 respectively. Nor was there any ruling on a pro se Motion for Summary Judgment filed by the International Maritime Transport officials, Mr. Peter Ludwig and Mr. Wolfgang Behrens, who served as agents of CTC in the transaction in question.

load its cargo. Plaintiff urged Mr. Aham to help him secure his cargo, about 773,398 barrels of crude oil aboard the M/V "Vytina". [J.Appx. 1069a] Plaintiff said he purchased the cargo from the Nigerian Petroleum Corp. (NNPC) and that he was in possession of genuine documents consigning the cargo to him. [J.Appx. 1069a] Plaintiff said that he tried to contact the "vytina" but lost touch with her; that upon further investigation he and his agent, International Maritime Transport, learned that the ship had been diverted to Philadelphia by British Petroleum. [J.Appx. 1069a] Plaintiff then proceeded to show Mr. Aham the document in his possession along with telexes and faxed messages, detailing their efforts to obtain cooperation from the Captain on the high seas, the Operators of the ship in Greece, the port agent, Rice-Unruh, in Philadelphia, Pennsylvania, and British Petroleum officials in Cleveland, Ohio. [J.Appx. 165a-171a, 29a-40a, 975a-980a, 262a] Plaintiff, John Indakwa, then mentioned that this was the second time British Petroleum had diverted a cargo consigned to his company. The first shipment diverted, he said, was carried aboard the M/V "Barbro" in January of 1989. [J.Appx. 761a-780a] He said the reason British Petroleum was diverting these cargoes was that they were taking advantage of the breakdown in law and order in commercial transactions in Nigeria.

At first blush, without looking at the documents, one could easily have dismissed Plaintiff's claim on the premise that a small company like Dr. Indakwa's CTC Imports and Exports had no business disputing over oil with a multinational corporate giant like British Petroleum. This was Appellant L. Obioma Aham's initial feeling. But on closer scrutiny of the documents Plaintiff brought with him, it was clear that something was amidst. If Plaintiff did not own the oil outright, then the cargo must have been mistakenly sold to both of them or even to more parties, or else, the NNPC officials were trying to defraud one of the parties.[4] These were quite clearly the options.

Indeed, before dismissing Plaintiff's statement offhand, one had to remember that the Nigerian Commercial market, particularly the crude oil market, is so corrupt that just about anything goes.[5] Mr. Aham came to this conclusion as one who has studied the impact of oil Politics on the Nigerian Development for over ten years, since 1979.[6] A major focus of these studies has been the problem of corruption in the oil industry, particularly in the bureaucracy charged with its administration, the NNPC. This is a well-known fact in Nigeria.[7] As a result of this information, Mr. Aham thought that Dr. Indakwas case deserved a closer look.

Mr. Aham looked through Plaintiff's papers carefully and interrogated the Plaintiff thoroughly on the origins of his documents, his contacts in Nigeria, his years of association with Nigeria and these contacts, the would-be buyers of his cargoes both of the "Vytina' and the "Barbro," his financial arrangements, bankers, letters of credit, his source of finances, his agents in Houston, the investors in the "deal" and about the failed shipment of the "Barbro." Mr. Aham, of course, warned Plaintiff that he must not withhold any information regarding these transactions, no matter how trivial. This warning was repeated for emphasis several times.

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[4] Indeed, the cargo aboard the "Vytina" was sold to more than one party. A party from Alabama and another from Panama also laid claim to the cargo. [*See* J.Appx. 493a, 928a]

[5] *See, e.g., The New York Times*, January 20, 1984 at 1, Col. 3, titled "Nigeria Under Shagari called Garden of Graft."

[6] These observations culminated in a Master's thesis at the University of Houston, University Park, in 1982 entitled "oil Politics and Development: An Analysis of the Impact on Agriculture in One OPEC nation—Nigeria." *See* Aham, L. O., Unpublished M.A. Thesis, Dept. of Political Science, University of Houston, University Park, Dec 1982. Further, since 1982 Mr. Aham has been working on a book on this subject.

[7] The important revelation on October 16, 1989, in *Newswatch*[8] (seven months after Plaintiff commenced his suit) by Dr. Tam David-West the Honorable ex-Minister of Petroleum for Nigeria, that he signed papers authorizing illegal allocation of oil to people at the behest of the president of the country, against his will, should lay to rest every and any speculation regarding this fact. [J.Appx. 1234a-1239a]

[8] *Newswatch* is Nigeria's leading news magazine.

Plaintiff, Dr. Indakwa, came to see Mr. Aham with one Mr. Joseph Olickan, an independent businessman who also resides in Houston. Mr. Olickan also confirmed everything Plaintiff said, and stated that he was with Plalntiff in Nigeria, during the negotiation of both the "Barbro" and the "Vytina" shipments. Mr. Aham was further told that Mr. Wolfgang Behrens, Plaintiff's port agent, a man with over thirty years of shipping experience, including six ears as captain, believes that the documents in the Plaintiff's possession on the "vytina" shipment were all genuine. Mr. Behrens has obviously dealt with bills of lading for a long time, so his observation thus carries weight.[9] Although Mr. Aham could not reach Mr. Behrens immediately after his conversation with Plaintiff, Mr. Aham, nonetheless, had no reason at that time to doubt Plaintiff's story. Mr. Aham thought that the documents in the possession of Plaintiff presented a prima facie case of moving forward with an action if he so desires. The possibility of fraud by Nigeria was well within contemplation. However, when Mr. Aham finally got hold of Mr. Behrens from Philadelphia, Mr. Behrens simply confirmed Plaintiff's story. He stated that Plaintiff's papers appeared genuine to him and that was why he had been working hard to verify their authenticity.[10]

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[9] *See*, reference to Mr. Behrens' experience in Maritime Affairs at [J.Appx. 1241a, 893a-898a].

[10] [J.Appx. 922a] *See further* [J.Appx. 926a and 927a]

Plaintiff's contact with the NNPC was a man named Mr. D. v. Fally, terminal officer of the NNPC at Port Harcourt, one of Nigeria's important port cities. [J.Appx. 772a] It should be stressed here that in Nigeria, men like Mr. Fally play an important role as middlemen who can make or break deals. In his official capacity, Mr. Fally has relevant information and knowledge of whatever goes on in that port. Moreover, it is well known that in Nigeria, the lower officials do the biddings of the higher-ups and provide them with deniability in case things go wrong. *see* J.Appx. 386a] So Plaintiff's story about Mr. Fally was not unreasonable at all. Mr. Aham, however, demanded copies of communication with Fally, and Plaintiff produced them. [See, e.g., J.Appx. 772a, 130a, 143a]. Indeed, the reason Plaintiff's situation cannot be easily discounted is the presence of countless chains of intermediaries operating in the fertile Nigerian crude oil market. The reason they persist is simply that most succeed, otherwise it will be a complete waste of energy and resources, not to talk of the folly of operating at no gain all the time.

From Mr. Aham's observation and scrutiny of the documents presented to him, he came to the temporary conclusion that: (1) It was possible, given these seemingly genuine documents and the absence of any document from Defendants, that CTC was the true consignee of the cargo aboard the "Vytina"; (2) that it was possible, given the unstructured, chaotic and profligate crude oil business atmosphere that the officials within the NNPC could have sold the oil to two or more parties, giving them equally authentic documents; or (3) that it may be possible that these NNPC officials intended to defraud both Plaintiff and others or perhaps Plaintiff alone. These theories were the entire possibilities of what could or may have occurred. Plaintiff had a bona fide claim under any of these theories, for the papers in Plaintiff's possession were just too genuine not to have come from within the ranks of the NNPC, if nothing else. And even if one accepts the Defendants' thesis that Plaintiff was defrauded because the date on his bill of lading read February 26th rather than the 24th written on that of BP/Sohio's, the incredible speed with which the documents coming from such a huge, secretive and tightly guarded bureaucratic organization like the NNPC with its separate departments, was all assembled—a mere two days difference—points to no other entity other than the officials of the NNPC. Indeed, the similarity in the contents of the two sets of documents is mind-boggling; figure for figure the documents, with the possible exception of the charter party's agreement, were all identical, all carrying the official letterhead and authentic inscriptions of the NNPC.[11] Again, with Nigeria, no one can be sure and no entity is immuned. The task, therefore, was how to help this Plaintiff verify proper title. Mr. Aham told Plaintiff that he was not yet accepting his (Plaintiff's) case but that he (Mr. Aham) will conduct further investigation on both the legal and factual grounds and get back in touch with Plaintiff. But in the meantime, Mr. Aham told Plaintiff to continue to use all the resources at his and the disposal of his agent, International Maritime Transport, to try and contact and communicate with Defendant's port agents, Rice Unruh, the Captain of the "Vytina", the operators and owners and the officials at British Petroleum, since he (Mr. Aham) did not have the adequate means to do all that. Plaintiff accepted, and the meeting on the evening of March 8, 1989 was over.

The next day, March 9, 1989, Mr. Aham began his investigation, believing that Plaintiff had a least a colorable claim. But this investigation was choked off by a call from Plaintiff that morning that the "Vytina", instead of arriving on the scheduled date of March 13, would be reaching the Delaware Valley on the 10th, the next day.[12] Pressed for time, Mr. Aham reviewed the facts again with Plaintiff, and commenced researching the legal basis for a temporary restraining order, at least for fraud by the NNPC, if nothing else. But first, Mr. Aham had to make sure that was indeed the case. The process of verifying title was rendered completely impossible by Defendants' unwillingness to cooperate and help Plaintiff verify title to the cargo.[13]

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[11] Compare, e.g., J.Appx. 262a (Plaintiff's original) *with* 264a (Master's copy) and 1011a (Defendant's original bill of lading). *See also* Plaintiff's NNPC documents on the M/T "Barbro" at J. Appx. 761a-779a, the "Vytina's" J.Appx. 29a-40a and the "Mari Christina's" at J.Appx. 177a-189a.

The uncertainty surrounding this case was further heightened by Plaintiff's and his agents' conversation with two representatives of British Petroleum (Sohio), namely Mr. Sheldon Russel, the Operations Manager, and Ms. Jennifer Streid-Mullen. [J.Appx. 490a-503a, 737a-744a, 908a-931a] According to Plaintiff, after he was unable to reach the ship, he tried reaching the owners and was later directed to speak with Rice-Unruh, the Defendants' agents in Philadelphia. [J.Appx. 488a, 927a] Unruh knew nothing at all about the Ship or the Shipment, but directed him to British Petroleum. [J.Appx. 490a] Because Plaintiff and his agents had dealt with Mr. Sheldon Russel and Ms. Jennifer Streid-Mullen, before when they tried to inquire about the shipment on the "Barbro", Plaintiff directed Mr. Behrens to get in touch with them again. [J.Appx. 927a] All of these, of course, manifest acts of good faith and shows that Plaintiff was only interested in getting to the bottom of things. These efforts, contrary to what this District Court has stated, do not in the least reflect an image of greedy people who had their eyes only on the $16 million cargo carried by the "Vytina". Plaintiff was merely interested in verifying the right title, nothing else.

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[12] Indeed, the "Vytina" reached Big Stone Key in Pennsylvania on the 10th of March, and started littering some of its crude oil cargo onto barges.

[13] *See* Plaintiff's deposition on lack of cooperation at J.Appx. 485a-509a, 525a-526a; Schieffen deposition on same subject at J.Appx. 826a; Behrens deposition at J.Appx. 929a; *See* Mr. Ludwig's deposition at J.Appx. 735a-736a, 750a-752a.

Mr. Behrens spoke to Mr. Russel and Ms. Streid-Mullen in the presence of Plaintiff. [J.Appx. 927a-491a] To Plaintiff's surprise, Mr. Russel and Ms. Streid-Mullen knew nothing about the cargo. [J.Appx. 493a] They explained that the "Barbro" shipment was different from the "Vytina" situation because British Petroleum/Sohio was the original lifter of the oil carried on the "Barbro". But that was not the case with the "Vytina". [J.Appx. 493a] Mr. Russel then told them that someone from Panama had called to sell them the cargo on the "Vytina", but that after checking, they found out that the party did not have the right documents. [J.Appx. 493a] Mr. Russel then offered to purchase the shipment from Plaintiff after he has settled the problem of title [J.Appx. 494a] Mr. Russel then asked Plaintiff to send him (Plaintiff's) documents, that he'll check and get back with Plaintiff and if possible get in touch with the captain for him. [J.Appx. 494a]

After two days, when Plaintiff did not hear from Mr. Russel, Plaintiff called again. But at this point the story had changed. [J.Appx. 495a] Mr. Russel told Plaintiff that the cargo was BP's; that they bought it from a third-party but they don't have the papers yet. [J.Appx. 495a, 928a-929a] Amazed at this one hundred and eighty degree turn around in Mr. Russel's and Ms. Streid-Mullen's story, Plaintiff questioned their title, asked that they send some proof of ownership, as he had just sent them. [J.Appx. 496a, 929a] Mr. Russel never complied. [J.Appx. 496a, 750a]

Mr. Behrens completely controverted Ms. Streid-Mullen's selfserving affidavit regarding the discussion that he thanked her for "Verifying that their papers were fraudulent" on the Barbro shipment. [J.Appx. 915a-916a] As with Mr. Peter Ludwig's deposition,[14] Mr. Behren's statements clearly demonstrate confusion and a genuine effort by Plaintiff to get to the bottom of this problem, not by mere word of mouth or "take it on faith," but by genuine proof that Plaintiff's documents were forged.[15]

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[14] *See, e.g.*, [J.Appx. 735a]

The flip-flop in British Petroleum's story coupled with the lack of cooperation by other parties tied the hands of Plaintiff and Mr. Aham. Even then, Plaintiff continued to try to reach Mr. Russel as Mr. Aham had advised, requesting information, any information, which could assuage Plaintiff's fears of being bullied by a multinational oil corporation like BP/Sohio with the wherewithal to do as they wish. [J.Appx. 495a-496a, 502a] No cooperation was forthcoming. No document was sent to Plaintiff. Nothing at all. Mr. Aham thought that the fact that British Petroleum was standing on a very shaking ground may prejudice Plaintiff's interest. If British Petroleum was simply buying the oil from other parties with similar documents as Plaintiff, Plaintiff would be better served if he placed himself in a strong position to assert his claim. Nonetheless, it became clear immediately that if Plaintiff did not act to secure his interest or get some cooperation to verify his documents, and if it turns out that he really had the authentic documents and the other parties did not, his rights would be prejudiced because the cargo of the "Vytina" would be offloaded as soon as the ship docks, and the ship gone before he can do anything, just like the "Barbro" case. [*See* J.Appx. 910a] Moreover, even if Plaintiff and some other parties had equal rights to the cargo and Plaintiff did nothing about it, every commercial lawyer knows that possession of a cargo is the best form of securing one's interest. In this scenario, Plaintiff cannot have recourse to a party with equal rights after the discharge of the cargo even if Plaintiff's documents turn out to be genuine later. He can only go after his sellers—the NNPC.

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[15] *See* [J.Appx. 913a, 508a, 736a, 847a-848a]

With these sombering thoughts, Plaintiff decided that his only option was to get a temporary restraining order detaining the M/V "Vytina" on arrival, since he had in good faith tried to verify proper title to no avail. [J.Appx. 525a] Contrary to the conclusion of the District Court that Plaintiff and his representative had not done enough investigation, or that their investigation was so "Woefully" inadequate [J.Appx. 13a] because they had *two* days—the 11th and 12th of March, which fell on a Saturday and a Sunday—to conduct a complete and thorough investigation, Appellants submit that Plaintiff had done enough investigation, but the Defendants would simply not cooperate. All the information that Plaintiff wanted was in the hands of the Defendants. There was nothing else Plaintiff could do save refrain from doing anything, which was not acceptable to him. If Plaintiff was really interested in nothing but the cargo, as the District Court has stated, one wonders why he would go to the length he did, sending anybody who was interested, copies of his documents;[16] exposing his documents out in the public for closer scrutiny. The only logical answer, and incidentally the only truth here, is that neither Plaintiff nor his counsel had anything of the intent being ascribed to them by Judge Bechtle. In fact, it would not have made any difference if Plaintiff's documents were forged, just so long as they were conclusively proven to be thus. This would have defined his options more clearly, saved the parties a lot of effort, resources, time and energy and would have enabled him to know who to pursue. For a person who had just expended over $350,000, (Three Hundred and Fifty Thousand Dollars) in costs, a mere "take it on faith, you've got the wrong document," would not suffice. [J.Appx. 429a] More was required. A minimum good-faith effort, at the very least.

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[16] *See* J. Appx. 750a.

Against this background came the heavily controverted communication from Ms. Kuo, who claimed to represent International Maritime Bureau, the investigative arm of the London-based International Chamber of Commerce.[17] The District Court conveniently stated that Ms. Kuo of International Maritime Bureau warned Plaintiff that he was in possession of forged documents, but he persisted in pursuing his claim. [J.Appx. 14a] Seen that way, of course, it would be most unreasonable for Plaintiff to seize a ship after such warnings. But alas, the statement, like many others in the decision below, was taken out of context, and Appellants respectfully submit that that was not what happened!

Plaintiff at that point was trying to get help from anybody. Again it would seem most unreasonable to reject help from such an august and prestigious body like the I.C.C. by any plaintiff, let alone one as learned as Dr. John Indakwa.[18] Plaintiff was just not any businessman off the streets. In any event, Ms. Kou's call was relayed to Mr. Aham on the evening of March 10, 1989. Plaintiff reported that she was very hostile in her tone throughout the conversation. [J.Appx. 509a-510a] Ms. Kuo said she was calling at the owner of the "vytina's" behest. [J.Appx. 746a] When she told him that you may have bought a cargo which does not exist, Plaintiff demanded an explanation, and inquired how she came to that conclusion. [J.Appx. 510a-511a] She offered none. Mr. Ludwig later related the same hostile experience narrated by Plaintiff. [J.Appx. 745a-756a] Mr. Ludwig completely controverted

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[17] *See*, Shiao-Lin Kuo's affidavit at J.Appx. 190a.

[18] He has an M.B.A. and Ph.D. from prestigious institutions like George Washington University in Washington, D.C., and Rice University in Houston, and has been a professor for fifteen or more years, headed a department for ten (Department of African and Afro-American Students), has written four or five books, and has several publications to his credit. [*see* J.Appx. 306a-361a]

Ms. Kuo's affidavit in his deposition. [J.Appx. 754a] Mr. Johnson, BP/Sohio's deposing lawyer, it should be noted, conveniently omitted this crucial conversation in his Reply Memorandum. The decision to omit by Mr. Johnson was not because such a conversation was trivial or irrelevant, but because it spoke too much of the truth to be included. Herein lies an example of the willful bad faith of the Defendants in bringing or continuing their Motion for Sanctions. Mr. Ludwig reported that Ms. Kuo spoke in an accusative tone, and that he has never met anybody who was so rude like that before. He threatened to hang up the phone if she did not calm down and state what she wanted. Mr. Ludwig gave her Plaintiff, John Indakwa's phone number, and she later reached him.

The disturbing aspect of the decision below is that the most important document purportedly giving Addax ownership right in the cargo aboard the "Vytina"—a purchase receipt from Basic Resources—was not present in the record. Mr. Mattioni, in his Motion for Expedited Hearing and Summary Judgment, which was filed before the District Court on March 27, 1989, merely states that "Basic Resources sold the oil to Addax."[19] Nothing was attached to prove this statement.[20] And despite this gaping defect in their case, the Honorable Judge Bechtle ruled that Defendants' documents showed a CONCLUSIVE chain of title from NNPC to Sohio. [J.Appx. lOa-lla] The question which naturally arises from this is: if the most important document conferring title was not present and neither Addax nor British Petroleum/Sohio had first-hand knowledge of what transpired in Nigeria, how then can the District Court have opined that by Addax to Sohio was "conclusive" after all, especially given the fraudulent nature of the country where these documents originated?

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[19] *See* Paragraph 7 at J.Appx. 62a.

[20] *See also* J.Appx. 86a-129a.

Indeed, Defendants' Motion for Summary Judgment should have failed on this point alone. It certainly should have been denied on the claim of Appellants for fraud by the NNPC officials. Mr. Mattioni meticulously attached every document that he could, save that which he must attach to claim title. The Charter party agreement and the agreement of sale between Addax and British Petroleum/Sohio were attached. [J.Appx. 86a-129a] But there was no purchase-sale agreement showing sale from Basic Resources. The absence of this document should have been fatal to Defendants' case. And thus, sanctions should never have been imposed on Appellants.

Appellants, at all times material hereto, believed that a reasonable good faith theory even in the worst possible case scenario where it is said that Plaintiff's papers were fraudulent, a case could be made to bring a claim of fraudulent sale against the NNPC and its officials and agencies like Gulf Shipping (Nigeria) Agency. This was the very reason why these entities were named in the complaint in the first place. But the Court below does not even consider this point. It deals with it in the most cursory fashion, stating only that Plaintiff has been defrauded before. [J.Appx. 14a, 18a] The Court did not consider who did the defrauding. Had it considered that point, it would have realized what Plaintiff and his lawyers have been saying since day one. The naming of the first Defendant, NNPC, should have alerted the Court to the other possible theories under which Appellants could have brought their case. The Honorable Judge Shapiro, on the other hand, considered this point within minutes, in her emergency session.[21] At the very least, one can take it that reasonable minds differ. But do such differences warrant sanctions? The answer, without a doubt, is no! Not with the abundance of the theories available to Appellants.

Returning to the events leading up to the seizure of the "vytina", as time pressed because the "Vytina" had begun littering some of its cargo, Plaintiff decided to seek outside help from counsel to deal with this emergency situation. Mr. Aham was advised to seek out a Philadelphia law firm to help. Mr. Aham sought out Simon W. Tache, Esquire, because of his extensive background in maritime affairs and law. Mr. Aham proceeded to brief Mr. Tache thoroughly and in addition put him in direct contact with Plaintiff to ascertain the facts for himself, which he did. [J.Appx. 32a] Mr. Aham and Plaintiff then faxed him the documents which formed the basis of the Complaint in question, and asked him to do his own investigation after receiving the documents, and advise. Mr. Aham also told Mr. Tache that Plaintiff's objective was: a temporary restraining order or some form of way to obtain cooperation of defendants so the parties can sit down and examine their papers and resolve this issue as promptly as possible without much delay.

On receiving the documents, co-counsel, Simon Tache, reviewed them, conducted whatever investigation that time allowed him, and advised that he thought also that Plaintiff had at least a colorable claim. Mr. Tache first confirmed that the "Vytina" will arrive on the 10th of March as Plaintiff had earlier suspected. The next day, Mr. Tache reported that the ship will stay at Big Stone Key and litter until Monday. the 13th of March. Mr. Tache then began the process of obtaining the arrest of the "Vytina", since some of the cargo was already gone. The arrest was effected on March 13, 1989. [J.Appx. 48a]

It should be stated outright that neither Mr. Aham nor Mr. Tache were aware of: (1) a letter dated January 27, 1989 from a certain Mr. D. L. McClure accusing Plaintiff of possessing a forged document on the Barbro shipment; [J.Appx. 781a-783a] and (2) about Mr. Joseph Olickan's documents consigning to him a certain cargo aboard the M/V "Maria Christina". [J.Appx. 176a-189a] Neither Plaintiff nor Mr. Olickan mentioned these facts, despite warnings by Appellants that no information, however trivial, be withheld from them. When Mr. Aham interrogated

Plaintiff in Houston about who his buyer for the "Barbro" cargo was, he merely said D. L. McClure. Asked further why the deal fell through, Plaintiff stated to Mr. Aham that he and his colleagues checked to see if Mr. McClure had the necessary funds, but that it came to their attention that the latter did not possess the necessary funds to conclude the deal. Asked further how he checked, he said he checked through friends at the Albraka Bank where the papers of the Barbro were kept. Plaintiff stated that when he was found that Mr. McClure did not possess enough funds, he never bothered with him again. This question was repeated twice in Philadelphia before Plaintiff's deposition by Mr. Tache not because the attorneys had any suspicion but just to make sure the facts were straight. Each time the same answer was given.

Indeed, Appellants submit that Plaintiff's answer was very reasonable under the circumstances and accords with the practice of the trade. The only way the information about Mr. McClure's letter could have been revealed other than by Plaintiff himself was through the process of discovery. It should again be stressed here that Mr. Aham and his co-counsel, Mr. Tache, were not serving as opposing attorneys to their own client, therefore their mindset and inclination towards critical analysis and outright suspicion of a witness' answer normally associated with opposing attorneys at a cross-examination, were not appropriate in this case. This is more so when a client's answer seemed reasonable at the time and in accord with the general practice of the trade. And as was earlier stated, the kind of Plaintiff involved here is not one that would ordinarily or unnecessarily provoke suspicion. It was therefore clear error for the District Court to impute to the attorneys the notice of the letter from Mr. McClure. This notice could only be imputed to Plaintiff, if at all. It should be said that no lawyer survives, who attacks his client, save a turn-coat situation, as if he were cross-examining a hostile witness, especially where the answers seem very plausible and reasonable.

When the McClure letter came to light after the ex-parte deposition initiated, conducted and attended only by the defense attorney, Mr. James Johnson, and representatives of Addax, Mr. Aham interrogated Plaintiff about the letter of January 27, 1989. He replied that he was uncertain about what happened on the "Barbro" shipment. When he took the letter to his lawyer at the time, his attorney advised that Mr. McClure was merely protecting himself legally, because he had signed an agreement committing himself to the purchase of the crude aboard the Barbro. [J.Appx. 759a-760a] Mr. McClure signed the agreement based on the photocopies of the documents Plaintiff presented to him. [J.Appx. 761a-780a] It was not immediately obvious to Mr. McClure that Plaintiff's documents were fraudulent. He saw nothing suspicious about them at the time. In fact, it took some time before Mr. McClure came to this conclusion.[22] Since he was unsure about what had really taken place in the "Barbro" affair, Plaintiff merely took his lawyer's advice and did nothing. Plaintiff further stated that merely saying that British Petroleum/Sohio lifted the oil does not mean his papers were fraudulent. He speculated that because British Petroleum/Sohio was a multi-national company, they could have reached the oil before him. Plaintiff said he needed more information before concluding that his papers were fraudulent having not seen what British Petroleum/Sohio had that entitled them to the cargo. Similarly, when Mr. Aham spoke to Mr. Olickan about the shipment on the "Mari Christina", he merely replied that he had taken the case to a lawyer but that the fees were too high, so he suspended his efforts about pursuing the matter further.

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[22] The agreement committing Mr. McClure to purchase the cargo of the Barbro was signed on January 3, 1989. He received copies of the documents the same day. It was not until January 27 did he finally send his letter rescinding the deal.

The only way Mr. McClure became aware that Plaintiff's papers were problematic was when he asked a friend to check to see who the original lifter of the oil was. This means of obtaining information by big oil companies is not available to everyone. Even Mr. McClure, an oilman himself for a long time and President of an oil company, Petrovest, did not have the capacity to engage in this kind of verification. Similarly, when Olickan sought to sell his oil to Transworld Oil U.S.A., the President and vice President of that company, who are seasoned dealers in the trade, could not tell from the papers presented to them whether the shipment was a fraudulent one or not.[23] They had to rely on sophisticated means of gathering information before they could come to the conclusion they drew. If seasoned oilmen cannot tell the difference between forged papers and authentic ones by merely looking at them, it follows that Appellants were even less equipped to make that conclusion.

Plaintiff's statements find corroboration from Mr. Wolfgang Behrens[24] and Mr. Peter Ludwig's[25] various testimonies. They said they were helpless at that time. Before they could even begin their inquiries the "Barbro" had unloaded its cargo, and the ship was gone. They had no choice but to accept the situation. Appellants submit here that as far as they can ascertain, Mr. Behrens never told Plaintiff that his papers were fraudulent on either the "Vytina" or the "Barbro". Mr. Aham has spoken to Mr. Behrens and Mr. Ludwig several times since the commencement of this action, and at no time have they indicated or mentioned to him that Plaintiff's papers were fraudulent. Nothing in their deposition indicates that they told Mr. Aham or Mr. Tache such. Instead, Mr. Behrens merely speculated that the problem with the Barbro shipment was because the bill of lading was not properly filled out. That, speculated Mr. Behrens, may have been why the shipment never arrived. It does not necessarily mean it was fraudulent.[26] Most of Mr. Ludwig's statement at his deposition corroborates this testimony. Plaintiff believed likewise. [J.Appx. 425a] This speculation led Mr. Behrens to draw up a list of what Plaintiff must include in a bill of lading and other accompanying documents to make sure that the problem of "Barbro" does not happen again. If there was a clear case of fraud here, it would have been fool hardy to continue. To the best of Appellants knowledge, Mr. Behrens declared that the papers in the possession of Plaintiff for the "Vytina" transaction appeared genuine. [J.Appx. 922a, 926a] While there was no Charter party's agreement, Plaintiff's C.I.F. arrangement did not require one.

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[23] See Affidavit of John Shepard, dated April 3, 1989. [J.Appx. 174a-175

[24] *See*, e.g., [J.Appx. 926a]

[25] [J.Appx. 726a]

Perhaps the most important information which Appellants submit, may have tolled or lifted the spectre of notice, was the answer Plaintiff'S contact in Nigeria gave him when he called to inquire about what went wrong on the "Barbro" shipment. Plaintiff was told by his Nigerian contacts, Mr. Fally, and other officials, that there was a mix-up and confusion among the officials about his shipment, however, that the problem had been rectified and that they have all agreed to REPLACE HIS CARGO AT NO FURTHER COST TO HIM. [J.Appx. 425a-426a]

According to Plaintiff, the Nigerian Officials then asked him to come to Nigeria when he was ready and they will nominate any ship already in the port to carry his cargo. [J.Appx. 434a-435a] In other words, the costs and charges for transportation, mooring and port dues, bunkering and insurance paid for the "Barbro" will carry over to the "Vytina"." No more money was required. All Plaintiff had to do was find a buyer who would obtain a new irrevocable letter of credit through a bank to pay for the oil. Plaintiff was perplexed by this gesture. If it could be said that these officials were trying to defraud him, why would they ask him to come back for another cargo at no further costs after accomplishing what they had initially set out to do? If the "Barbro" deal was truly fraudulent, Appellants reasonably speculated, why would the Nigerians not ask for another payment for another shipment? Again in the unstructured and chaotic business atmosphere in that country, one just can never tell. Being a businessman who had hoped to continue his dealings with Nigeria provided it could be shown that it was on good faith, he decided to give it a try, after all, there was no further cost to him.

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[26] [J.Appx. 917a]

After a few days of negotiation on the price, Plaintiff arrived in Nigeria on the 22nd of February [J.Appx. 450a] (several days before the "Vytina" departed, by either the Defendants' or Plaintiff's bill of lading date). At that time, even assuming Defendants' claim of ownership was correct, the Nigerians were well aware that they were dealing with at least two parties. The speed with which they released the two sets of documents—merely two days apart—confirms this.

However, when it seemed that the "Barbro" situation might repeat itself in the "Vytina" case, Plaintiff quickly took a decisive action to bring order into what seemed a mindless "rip-off" game. It is the submission of Appellants that such acts of bravery as was exhibited by Plaintiff should have been commended and encouraged rather than chastised and sanctioned. The decision by the District Court has no other effect other than to chill whatever enthusiasm and zealous advocacy within the bounds of law which Plaintiff's counsel brought with them. Rather than bringing clarity to this very complex situation, the decision below befuddles clarity, allowing in the process, a defendant, Addax, without proper proof of purchase title (at least none was produced) who had no first-hand knowledge of what transpired in Nigeria, and a would-be defrauder, the NNPC or its officials with unclean hands, to go scot-free without equitable redress for the victim of such schemes. Such a decision, Appellants submit, was clearly erroneous. A motion for summary judgment, it is again submitted, should never have been granted, let alone the imposition of sanctions for frivolous suit, and let alone, the imposition of sanctions for alleged multiplication of a proceeding in an abusive and vexatious manner.

When Appellant, Mr. Aham, appeared before the Lower Court on March 31, 1989, to defend against Defendant's Motion for Summary Judgment, Plaintiff's Complaint was dismissed for lack of proper verification pursuant to Rule C(2) of the Rules of Procedure in Admiralty matters. [J.Appx. 5a] Plaintiff's counsel, Mr. Aham, made several efforts at persuading the District Court to allow them the opportunity to cure, given that time was of the essence when the Complaint was filed (a fact recognized by Judge Shapiro during an earlier hearing). [J.Appx. 1036a] The Court nonetheless dismissed the Complaint on the baseless and erroneous ground that Mr. Tache had "misled it". [J.Appx. 1035a] The District Court then proceeded, again in clear error, to apologize to Defendants for failing to see that it was being misled all along by Appellants. [J.Appx. 1038a-1038a] The apology came even before the Honorable Judge Bechtle had the opportunity to see the documents in the possession of Defendants; for those documents arrived at the Courthouse the morning of March 31, 1989, the day this Complaint was dismissed. The apology came despite the fact that Defendants reargued everything they had presented before Honorable Judge Shapiro, with the possible exception of the Captain's deposition, and yet Judge Shapiro rejected their argument. Most importantly, the apology accords with Judge Bechtle's previous propensity for prejudging Plaintiff's case.[27]

As for the Captain's deposition, while the Captain testified that he did not sign Plaintiff's documents, there were many discrepancies in his testimony[28], and also in Defendants' documents. These discrepancies were called to the attention of the Lower Court in Appellants' defense to the Motion for Sanctions, and recently in their Motions for Reconsideration. [J.Appx. 273a-284a, 1068a-1093a] The most notable of these discrepancies was the presence of several unmatching bills of lading which were represented as copies of originals and which bore no resemblance to originals when they were eventually produced. Moreover, the bewildering reaction of seasoned shipmen like Mr. Behrens, who has over thirty years of shipping experience, some as captain of vessels, and Mr. Peter Ludwig, who has over sixteen years of shipping experience, especially working with bills of lading, is particularly instructive here. To the astonishment of Mr. Aham, both men were perplexed when he showed them the Defendants' original papers. They described the documents as the most unusual bills of lading they had ever seen and even used the term "phony", as Mr. Behrens Affidavit explains. [J.Appx. 1240a-1243a] For lawyers schooled in the art of skepticism, this was certainly cause enough for further investigation. So, despite the difficulty presented by Plaintiff's papers, Appellants did not withdraw from their case as the District Court and Defendants contended they should have, due in part because they felt they had to investigate further these discrepancies raised by the Defendants' papers, and in the worst possible case, felt they had a colorable claim for fraud against the NNPC and its officials.

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[27] See for example report of the proceeding before him on March 21, 1989, where he says Plaintiff's "claim has less than the traditional integrity to it." Upon uttering his statement the Appellants frowned at this unwarranted prejudicial remark. Seeing the reaction, the Honorable Bechtle quickly added "something wrong with terms, *I guess*. You don't know who signed them, and other things." It was profoundly clear to Appellants that they could not expect to receive justice from the Honorable judge. [J.Appx. 106Oa] [emphasis added]

[28] Appellants were well aware of the many Maritime fraudulent incidents involving unscrupulous tanker Captains whose bought connivance with the owners of the vessel and other parties have defrauded rightful owners of their cargoes. [(see, e.g., case of Armanda Supply, Inc. v. S/T Agios *Nikolas*, 613 F.Supp. 1459 (S.D.N.Y. 1985), on reh'g. 639 F.Supp 1161 (S.D.N.Y. 1986), where the cargo aboard the ship had been replaced with seawater. Given this knowledge and Mr. Tache's experience, Appellants were very skeptical about the Captain's testimony because he left many nagging questions unanswered, violated many rules pertaining to the documentation which he claimed he signed or was carrying. [*see* J.Appx. 1240a-1243a] Plaintiff's representatives pointed out the discrepancies in the bills of lading in Defendants' possession and not least of all, the Captain's testimony that he only signed a handwritten copy of the Tanker Port Performance Sheet report. He testified that he has never signed a printed tanker sheet. But his signature appeared in the printed Tanker Port Performance Sheet original document presented by Defendants. *compare* J.Appx. 1220 (the handwritten) *with* 1223a (the printed).

Additionally, Appellants submit that not only was the apology rendered by the District Judge in this case premature and in clear error when the only decision he reached on that day was a dismissal on a mere technicality for failure to attach a statement of verification along with the Complaint, further, the statement which accompanied the Order of dismissal warning that if Plaintiff should try to bring back his case, "substantial" security will be required "*by reason of the events that have taken place to date*" had no foundation whatsoever. [J.Appx. 5a] Its inclusion reveals a consistent trend by which the Court below sought purposefully to prepare well in advance the grounds for not only dismissing Plaintiff's case, but holding that Appellants also acted in bad faith. These attempts to stretch the facts and the law in order to impose sanctions on Appellants go too far, and perhaps, even violate the Code of judicial ethics. Not one single point in favor of Appellants was ever mentioned, neither was any single doubt, even the most controverted statement, resolved in their favor as mandated by law. All the foregoing factors no doubt galvanized to tarnish the record and laid the foundation for the unfavorable regard in which the court came to hold Plaintiff and his counsel and their case.

Given the foregoing, the District Court's eventual acquiescence in the clamor for sanctions by defense attorneys whose clients had no first-hand knowledge of the transactions at bar was very surprising. Further, it was clear to Mr. Aham, who was present before the Court at the Motion for Summary Judgment hearing, that the Honorable Judge Bechtle, despite the paucity of the evidence before him, was predisposed in the direction of sanctions when in addition his prejudicial remarks, he encouraged the Defendants to keep record of their hours, and that he will impose sanctions if it is frivolous. [J.Appx. 1024a]

The wisdom of these open prejudicial remarks in addition to the ones made earlier was questioned silently by Mr. Aham, who no doubt felt that inspite of the reasonableness that Appellants had exhibited throughout the proceedings and inspite of the good faith basis they had in bringing this suit, and in spite of all the plausible legal theories which could be advanced in support thereof, if this case should ever turn on discretion, they had no chance; for it was clear to him that the Honorable Judge had abused every inch of discretion already available to him, and was even invading areas of mandatory laws.[29] Mr. Aham later conveyed what had transpired to the client and warned that in view of what seemed a predisposed and biased attitude of the District Court toward favoring the Defendants and thus for sanctions, while he (Mr. Aham) still believed in the plausible legal basis for continuing the case, he would not re-file the case or attend any proceedings unless Plaintiff was ready to put up the security which the Court might require. And indeed, no other action or papers filed by either Mr. Tache or Mr. Aham after dismissal of the suit on technicality can be regarded as continuing a frivolous suit, not to talk of bad faith, let alone intentional bad faith. All papers filed were *defensive papers*, in response to Defendants' Motions. Plaintiff's attorneys merely responded as of right to these motions. None was initiated by these Appellants. The continuation of discovery by Mr. Johnson of BP/Sohio and Addax's representatives were to enable them to prove their case for sanctions.[30] Thus, for over one year after Plaintiff commenced his suit and several months after his attorneys withdrew from the case, Defendant were still trying to prove the case they made from the beginning without much evidence, i.e., that Plaintiff's case was frivolous. The District Court acquiesced into this unfortunate scheme, sanctioning the Appellant for the Defendants' entire costs of litigation up until the time of its decision on April 27, 1990, even after it had "guessed" as far back as March 21, 1989, that Plaintiff's case lacked "the traditional integrity to it." [J.Appx. 1060a] What greater travesty of justice exists?

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[29] As for example when the District Court wrote that it is within its discretion to find bad faith, when the law requires that bad faith *must* be found. See § 1927 of 28 U.S.C.

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no other related cases and proceedings involved in this dispute now before this Court.

STATEMENT OF STANDARD OR SCOPE OF REVIEW

What is at stake here is primarily a question of law. There was no trial before the jury or the judge. Most of the evidence produced has been largely, if not entirely, reduced to writing. The question, therefore, is given the facts of the case whether the District Court abused its discretion? Even if this were, as the District Court treated it, a case where Defendants have correct title to the cargo of the "Vytina", the judgment of April 27, 1990, mandating sanctions on Plaintiff and his attorneys cannot stand. There was clear error on every crucial aspect of the District Court's decision. The first crucial standard to remember is that what is in contention in this case is the standard of commencement of a suit, not whether the Plaintiff ultimately prevails. It was clear error for the Court to have confused these standards.

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[30] The Defendants started threatening sanctions from March 14, 1989, at a conference call between the parties. The threats came even before they knew what papers their clients possessed.

Secondly, it was clear error for the District Court to have opined that Defendants' documents were conclusive, when they were not. It was clear error to have ignored all the possible legal theories under which Appellants could have brought their case. It was clear error and an abu of discretion for the Court to have ignored the issue of who defrauded Plaintiff, and to have taken a great deal of the facts and circumstances under which the proceeding occurred out of context. Further, even if a case for frivolity is established, it was clear error and an abuse of discretion for the District Court to allow the Appellees to continue running up costs and legal fees for over a year after he had already declared that Plaintiff's case "lacked the traditional integrity to it." No abuse of discretion could be greater than this attempt to pervade the proceedings below by the District Court's personal bias and prejudice.

Lastly, there is insufficient evidence in the record to establish egregious conduct, willful or intentional bad faith on the part of Appellants. The Defendants brought their Motion for Sanctions for the sake of sanctions and as a means of distracting and diverting the attention, energy, time and over-extending the meager resources of Plaintiff and his attorneys, not because they cannot see a plausible attempt by Plaintiff to bring a reasonable case. However, as the evidence adduced during the course of the proceedings below were entirely or largely documentary, it is generally recognized that this Honorable Court is not bound by the decision and judgment of the District Court below and must therefore rely on its own review of the documents to determine whether the decision below was justified. *See generally* 5A C.J.S. 1660 at 597; *See also* 5 Am Jur 2d 824 at 266.

SUMMARY OF ARGUMENT

The District Court clearly erred when it decided improperly that Appellant Simon Tache's signing of the Complaint violated Rule 11 of the Federal Rules of Civil Procedure. Likewise, the Court below clearly erred in deciding that the entry of appearance of L. Obioma Aham and the conduct of the attorneys thereafter multiplied the proceedings and was vexatious and in bad faith and constituted dilatory and abusive tactics in violation of 28 U.S.C. § 1927.

For a violation of Rule 11 to be properly upheld, this Honorable Court has said, it must be established that Appellants had no basis in fact or law to bring their case, and that no reasonable argument could be advanced for the reversal, extension or modification of the existing law. *Teamsters Local Union No. 430 v. Cement Exp. Inc.*, 841 F.2d 66, 68 (3d Cir. 1988); F.R.C.P. Rule 11. Appellants had several theories of law which they could reasonably have advanced in support of their claim had they been given the opportunity so to do. As a possessor of documents presumatively deemed authentic, Appellants could have reasonably argued that Plaintiff was the rightful owner of the cargo aboard the M/V "Vytina". In the alternative, Appellants could have argued that Plaintiff was co-owner of a cargo consigned to more than one party. Failing that, Appellants could have reasonably argued that Plaintiff was within his legal rights to arrest a ship bearing the object of a fraudulent scheme of which he was the intended victim. This was precisely why Appellants named the NNPC in their suit.

For an imposition of sanctions under 28 U.S.C. 1927 not to amount to an abuse of discretion, it must be shown that Appellants multiplied the proceedings vexatiously and in willful or intentional bad faith in order to harass Defendants or abuse the judicial process. *Ford v. Temple Hospital*, 790 F.2d 342, 347 (3d Cir. 1986). Nothing in the record supports such willful or intentional bad faith claim by the Judge below or the Defendants-Appellees. Rather, there is ample evidence to support Appellants' contention that the Motion for Sanctions was brought by the Appellees merely for the sake of harassing Appellants into dropping their legitimate suit and to tax their time, energy and scanty resources.

ARGUMENT

The undersigned Appellants respectfully request this Honorable Court to set aside entirely, the Order of April 27, 1990, imposing sanctions on them for alleged violations of Rule 11 of the Federal Rules of Civil Procedure and § 1927 of 28 U.S.C. Under the facts of this case and the existing law, it was clear error for the District judge to have held that they acted in bad faith, and an abuse of discretion to have imposed sanctions on them.

I. THE DISTRICT COURT'S FINDING THAT THIS CASE WAS FRIVOLOUS FROM THE START, THUS WARRANTING THE IMPOSITION OF RULE 11 SANCTIONS ON APPELLANT, SIMON W. TACHE, IS UNSUPPORTABLE BY THE FACTS OF THIS CASE OR THE EXISTING LAW, AND AS SUCH CONSTITUTES AN ABUSE OF DISCRETION.

Rule 11 of the Federal Rules of Civil Procedure requires that by signing a pleading, motion or other paper, an attorney or party certifies that to the best of his knowledge, information and belief formed after reasonable inquiry, it is well-grounded in fact and warranted by the existing law or a good faith argument for the extension, modification, or reversal of the existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. Fed. Rules Civil Proc. 11.

The Rule further provides that if a pleading, motion or other paper is signed in violation of the rule, the Court

> Shall impose upon the person who signed it . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing including a reasonable attorney's fee.

Id.

The purpose of Rule 11, as this Honorable Court has stated, is to discourage pleadings that are frivolous, legally unreasonable or without factual foundation. *Lieb v. Topstone Industries, Inc.,* 788 F.2d 151, 157 (3d Cir. 1986); *Napier v. Thirty or More Unidentified Fed. Agents,* 855 F.2d 1080, 1091 (3d Cir. 1988). The Third Circuit's standard for testing conduct under Rule 11 is an objective "reasonableness under the circumstances". *Gairdo v. Ethyl Corp.,* 835 F.2d 479, 482 (3d Cir. 1987); *Napier, supra* at 1091; *Teamster Local Union No. 430 v. Cement Express, Inc.,* 841 F.2d 66, 68 (3d Cir. 1988); *Eavenson, Auchmuty & Greenwald v. Holtzman,* 775 F.2d 535, 540 (3d Cir. 1985).

In determining the reasonableness of an attorney's prefiling inquiry, the District Court, it is said, must consider four factors:

(1)The amount of time available to the signer for conducting relevant factual and legal investigation,

(2) The necessity for reliance on a client for underlying factual information.

(3) Whether the case was referred to the signer by another member of the bar; and

(4) The plausibility of the legal position advocated.

Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 95 (3d Cir. 1988); *Matthews v. Freedom,* 128 F.R.D. 194, 197 (E.D. Pa. 1989); Fed. Rules Civ. Proc. 11, Notes of the Advisory Committee.

The Third Circuit has repeatedly cautioned that District Courts should avoid using the wisdom of hindsight and should test the signer's conduct by asking *what was reasonable to believe at the time the pleading was submitted. Teamsters,* 841 F.2d at 68. (Emphasis added). The correct Rule 11 inquiry the District Court should make, this Honorable Court said in *Lingle,* is whether at the time the signing attorney filed the complaint, he could *reasonably* have argued in support of his *legal theory. Lingle,* 847 F.2d at 96. (Emphasis added). *See also* Teamsters, 841 F.2d at 70. Additionally, *any* and *all doubts,* it is stressed, must be resolved in favor of the signer. *Eastway Construction* Corp. v. City *of New York,* 762 F.2d 243, 254 (2d Cir. 1985) (Emphasis added). Only where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where *no* reasonable argument can be advanced to *extend, modifY* or *reverse* the law as it stands, will Rule 11 have been violated. Id. (Emphasis added).

Considering the four *Lingle* factors in light of the circumstances surrounding the signing of Plaintiff's claim.

1. The Available Time

It has been established that Appellant, L. Obioma Aham, got involved in the case on March 8, 1989, when the "Vytin[illegible]" was steaming ahead and about to dock. [J.Appx. 1[illegible]9a] Mr. Aham thus had roughly one and a half days to carry out both factual and legal investigation before the news of the ship littering its cargo at Big Stone Key

Pennsylvania got to him. It has further been established that Mr. Tache got the documents on a Saturday morning, March 11, 1989. [J.Appx. 274a] The Defendants intransigence and failure to cooperate along with Ms. Kuo's hostility narrated at length in Plaintiff's and Mr. Ludwig's depositions,[31] and the fact that Plaintiff himself, John Indakwa, believed that the documents in his possession were genuine, all galvanized to make the filing of this suit one of necessity.

With respect to the District Court's contention that time was *never* of the essence when Mr. Tache filed Plaintiff's suit, Appellants respectfully submit that such statements flies in the face of the evidence. Mr. Tache had only two days in which to carry out all the necessary investigation needed to determine the plausibility of Plaintiff's claim. These two days, as has been noted, were a Saturday and a Sunday. Besides, the "Vytina" had already discharged some of its cargo. It littered some of the crude oil it was carrying onto barges on March 10, 1989. And from all indications any more waste of time would have resulted in the ship completely discharging and leaving the jurisdiction. Appellants submit that even the most stringent of all laws could not have contemplated such reasoning. Time was indeed of the essence when Mr. Aham took the case, and time was also of the essence when Mr. Tache filed the Complaint on Monday, March 13, 1989. The Honorable Judge Shapiro expressly recognized this fact. So did the Court below, albeit its recognition came during the apology rendered to the defense counsel. [J.Appx. 1038a] The decision below thus undoubtedly fails the first prong of the *Lingle* test.

2. The necessity for Reliance on a Client for underlying factual information.

Appellants readily acknowledge that complete reliance on one's clients for all the information and investigation necessary to commence a suit could lead to serious consequences, and in extreme cases, could probably attract sanctions under Rule 11. However, the necessity for reliance on a client for factual information in this case cannot be over-emphasised, particularly when that information is largely documentary and the client has the years of education, knowledge and experience of Dr. John Indakwa. Add on to that the fact that he was physically in Nigeria and had first-hand information. Additionally, he has dealt with Nigeria as a part-time businessman for over ten years, most of it in oil related transactions. [J.Appx. 362a-363a] To these must be added the very crucial point that the opposing side was not willing to cooperate with Plaintiff. Further, it should again be stressed that for the purpose of merely commencing a suit, Plaintiff's attorneys were not meant to act as defense attorneys at a cross examination or opposing side of a discovery, and were therefore not expected to question their own client with extreme or unnecessary skepticism, particularly when the answers given at the time seemed reasonable and in accord with the practice of the trade. Viewed from this perspective, the investigation that Plaintiff's attorneys undertook and the time they had to complete such investigation, will be better appreciated.

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[31] *See*, Excerpts of Deposition of Peter Ludwig at J.Appx. 750a.

The Appellees' central argument, which the District Court unfortunately but erroneously adopted, must be considered against this background. Firstly, the argument that the investigation the Appellants conducted was "woefully inadequate" because a peak into the Maritime log book or even a simple phone call to the Nigerian authorities would have told Appellants that the "Vytina" left on February 24, 1989, and not the 26th written on Plaintiff's bill of lading. Secondly, the argument that if Mr. Tache and Mr. Aham had asked Mr. Wolfgang Behrens, Mr. Peter Ludwig, Mr. Jack Schiefen or Mr. D. L. McClure, it would have been clear to the attorneys that the papers in the possession of their client on the "Vytina" shipment were fraudulent like the shipment on the "Barbro" before it.

For one thing, any person who has tried calling Nigeria on the phone would not venture the first argument, for it is common knowledge that Nigeria is one of the most difficult countries to contact by telephone. Appellants tried for days to reach that country to no avail. But even if we accept the premise of Appellees thesis for argument purposes, it would have only made sense if the only legal basis for bringing Plaintiff's suit depended entirely on one theory—the claim against BP/Sohio. But that is not the case here. Again, had the District Court considered the possibility of suit against NNPC as the title of the Complaint reads, calling Nigeria or looking into the Maritime log books would have made very little difference. Either way, Plaintiff would have had a case against some entity, unless the Defendants were prepared to show that the NNPC did not defraud Plaintiff and Plaintiff knew that. Absent any conclusive showing that the NNPC officials did not defraud Plaintiff, both the Appellees' argument and the Court's adoption thereof evaporates.

Similarly, the second argument that asking the people deposed by Mr. Johnson would have revealed to the Appellants that Plaintiff'S papers were fraudulent, falls flatly on its face when considered against the superior argument of the failure of the District Court and Defendants to consider the alternative theories of law on which Plaintiff could have brought his case. Further, it has already been established that the attorneys knew nothing about Mr. McClure's letter. At the same time it was further established that even Mr. McClure himself could not tell immediately whether the photocopies of the documents he received on the "Barbro" were genuine or false, and that he concluded a valid agreement based on these documents before canceling out later on.

Even if one could argue as the District Court has, that Appellant had notice of fraud, Appellants respectfully submit that this notice could only have barred an action against BP/Sohio but again, not against the NNPC regardless of whether the fraud against Plaintiff occurred once or a hundred times. A victim of fraud can always go against the defrauder at any time. Seizing an object which forms the basis of a fraudulent sale in this respect was not an unlawful act. Thus, appellants submit that while it was necessary for Plaintiff's attorneys to rely somewhat on the information provided by the Plaintiff, there was no complete reliance. If the attorneys relied completely on only what the Plaintiff said as the Court Below stated, the naming of the NNPC as a possible perpetrator of fraud would not have occurred. There was also their own experience and the documents themselves to consider. What Plaintiff did not reveal, if anything, goes to his own personal credibility and not to the credibility of his attorneys. And certainly, this is not ground enough to sanction the attorneys.

3. The referral of this case by Mr. Aham

The conditions under which this case was referred to Mr. Tache have already been discussed in detailed in the Statement of Facts. Suffice it to say that all the facts available to Mr. Aham, were relayed to Mr. Tache. In addition, Mr. Aham also put Mr. Tache in direct touch with the Plaintiff to learn the information for himself first hand. After due consideration, Mr. Tache took the case but largely on the strength that suit could also be brought against the NNPC.

4. The Plausibility of the Legal Position Advocated.

The bases of the legal position Plaintiff could have reasonably advocated are that: Firstly, since Plaintiff had what appeared to be genuine papers, the cargo aboard the "Vytina" was Plaintiffs. Under Federal Rules of Evidence, Rule 902(7) trade inscriptions or labels purporting to have been affixed in the course of business and indicating ownership, control or origin, are presumptively self-authenticating. So also are Rule 902(9) Commercial paper and related documents, with signatures thereon; they are self-authenticating to the extent provided by general commercial law (Fed. Rules of Evid. Rules 902(7) and (9)). The rationale for this is quite simple. If a duty is imposed on every business person to investigate whatever document he has in his possession, the entire world of commercial transactions would come to a grinding halt. Imagine the extension of such a duty beyond the borders of this country to other countries with differing legal and commercial rules. One quickly appreciates how this problem could magnify if that duty to investigate were to be imposed on international commerce. Since documents are the life blood of international commerce, the imposition of such a duty will simply be unworkable. So, absent any prior real notice of fraud, and in the absence of a convincing evidence to the contrary, Plaintiff plausibly believed he had the right to title to the cargo of the "Vytina".

Secondly, in the alternative, even if it could be argued that the cargo could have been sold to two different parties, both of whom had equally authentic documents, Plaintiff believed the best way to safeguard his interest was to get physical possession of the cargo in dispute before the "Vytina" completes the offloading process. Lastly, in the extreme event that Plaintiff's papers are conclusively proven to be false, Plaintiff would of course not be deemed to be in possession of the correct documents. However, he would still have the right to pursue the cargo which forms the basis of the fraud which still bears the interest of the NNPC, the defrauder. Since there is no concrete evidence to prove that the NNPC did not sell plaintiff those papers, a cause of action could still lie under the equitable principle of fraudulent sale. In other words, since a defrauder still has an interest in the cargo, it would be manifest injustice if this defrauder is made whole by allowing it to receive its money back while leaving a defrauded Plaintiff without remedy. Again, this was why the NNPC and Gulf Shipping Agency were named as Defendants in the first place.

However, forum in Nigeria is not convenient.[32] Not only is there a Military government that rules by decree, having suspended the country's constitution since 1984, but it is widely believed that these fraudulent activities originate from the Military officials themselves for use as political patronage and that the entire scheme operates with their bought connivance and implicated blessings. The statement of the Honorable ex-Minister of Petroleum of Nigeria in this respect should lay all doubt to rest.

Under the last theory, Plaintiff could bring his case in Nigeria or in the United States but provided that if it is brought in this country, he is able to show sufficient minimum contact as not to make the suit unjust to the foreign defendant.[33] But, asking Plaintiff to go to his sellers or defrauders and seek redress, i.e., to ask the NNPC to police itself, would be tantamount to asking a prisoner to be his own warden. Because Plaintiff does not expect to receive justice in Nigeria, his lawyers believed that jurisdiction can attach both under the minimum contact doctrine of *International Shoe* and/or the "Effects" doctrine in International law.[34]

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[32] 32 See e.g., Hatzlachh Supply v. Tradewind Airways, 659 F.Supp 112 (S.D.N.Y. 1987) (for a proposition that forum is not convenient in Nigeria; See also Hatzlachh Supply v. Savannah Bank of Nigeria, 49 F. Supp. 688 (S.D.N.Y. 1986))

[33] *See International Shoe* v. Washin *ton*, 326 U.S. 310 (1945)

[34] The effects of fraud committed abroad, being felt in the United States. See, e.g., The SS Lotus case. France v. Turkey, P.C.I.J. Reports Series A, No. 10 (1927).

These were the theories under which Plaintiff's case was going to be argued. But the complaint was dismissed pursuant to a technical violation.

Even if it could be argued that Appellants would not have ultimately prevailed, this Honorable Court has stressed time and time again that Plaintiff and his attorneys are not obliged to prove their case in order to escape Rule 11 Sanctions. *Lingle*, 847 F.2d at 96. Rule 11 sanctions are not meant to be used against everyone who cannot prove his case, but are appropriate regarding the initiation of a lawsuit *only if* the filing of the complaint constituted abusive litigation or misuse of the Court's process. Teamsters Local Union, 841 F2.d at 69. Appellants respectfully submit that this is the heart and soul of Rule 11. The mere failure to prevail, if at all, does not trigger a sanction award. *Lingle*, *supra* at 96. *Gaiardo*, 835 F.2d at 483. Not even a mischaracterization of their theories could have invited sanctions. Id. Rule 11, it has been said, may not be invoked because an attorney, after time for discovery, is unable to produce adequate evidence to withstand a Motion for Summary Judgment. *Id.* at 69. Litigants, it is further said, misuse Rule 11 when sanctions are sought against a party or counsel whose only sin was being on the unsuccessful side of a ruling of judgment, ". . . substantially more is required" *Id.* at 68. Appellants, therefore, submit that given these pronouncements by the Third Circuit a other courts, it was an abuse of discretion for the District Court to have reached the conclusion that Mr. Simon Tache violated Rule 11.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN IMPOSING SANCTIONS ON APPELLANT, L. OBIOMA AHAM, ESQUIRE, FOR ENTRY OF APPEARANCE AND CONDUCT WHICH ALLEGEDLY MULTIPLIED THE PROCEEDINGS VEXATIOUSLY AND IN BAD FAITH IN VIOLATION OF THE PROVISIONS OF § 1927 of 28 U.S.C.

Taken apart, the District Court's entire reasoning why Mr. Aham should be sanctioned pursuant to 1927, can be grouped into ten parts:

1. Mr. Aham entered his appearance on behalf of Plaintiff.
2. The entry of appearance on March 31, 1989 came *after* the arrest of the Vytina had been vacated by Judge Shapiro (Emphasis supplied by the Court).
3. In addition, Mr. Aham appeared before this court at a Motion for Summary Judgment-on March 31, 1989.
4. Mr. Aham was not acting under the alleged time constraint impacting on Mr. Tache (Emphasis by Appellants).
5. *Interim* discovery made the frivolity of Plaintiff's claim even more apparent. (Emphasis by Appellants).
6. The Court will sanction Mr. Aham *in the amount of defendants' costs, expenses and attorneys' fees incurred after he entered his appearance* on March 31, 1989 pursuant to 1927. (Emphasis by Appellants).
7. § 1927 represents a continuing obligation upon counsel to refrain from *dilatory* and *abusive* tactics and *avoid* prolonging meritless claims. (Emphasis by Appellants)

8. In *order for* this court *to impose* an award of attorney's fees under this section *there must* be a *findinq* that the attorney *acted* in *bad faith*. (Emphasis by Appellants)
9. The *decision* to *find bad faith* is *vested* within the *discretion* of the trial court. (Emphasis by Appellants)
10. In the *exercise* of *its discretion* the court *finds* that Mr. Aham prolonged this frivolous suit by entering his appearance and joining in all papers filed after this appearance. (Emphasis by Appellants) [J.Appx. 16a-17a]

Having correctly determined that Appellant Mr. Aham cannot be liable for sanctions under Rule 11 because he did not sign the complaint[35], *see also Pavelic & Leflore v. Marvels*, 110 S. Ct. 456 1989), the District Court nevertheless proceeds to find that such sanctions are in order merely because Mr. Aham entered his appearance in a case he reasonably believed had merit or at least a colorable claim. The Court based its decision on its interpretation of 28 U.S.C. § 1927, the provision for counsel's liability for excessive costs.

28 U.S.C. §1927 provides in its entirety that:

> Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so *multiplies* the *proceedings* in any case *unreasonably and vexatiously may* be regarded by the court to satisfy personally that *excess* costs, expenses and attorneys' fees *reasonably incurred* because of such conduct. (Emphasis by Appellants).

From the foregoing, it is manifestly evident that the plain meaning, the very words of 1927, do not and cannot accord with the convenient interpretation of the District Court. The Supreme Court of the United States has decreed that as with Federal Rules of Procedure, Statutes should be given their plain meaning. Walker v. Armco Steel Corp., 446 U.S. 740, 750, n.9, 100 S.Ct. 1978, 1985 n. 9, 64 L.Ed. 2d 659 (1980); see also Pavelic Leflore v. Marvel, 110 S.Ct. 456, 458 (1989). And when the terms of Statutes are unambiguous, judicial inquiry is generally complete. *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed. 2d 633 (1981).

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[35] *See* J.Appx. 16a.

Section 1927 says unequivocally and unambiguously that before an attorney is sanctioned, there *must* be a finding that he:

> (1) *Multiplied* the proceedings; (2) did so *Unreasonably* AND; (3) *Vexatiously*; (4) even then Sanctions are not mandatory but he *may* be required by the Court to satisfy; (5) the *excess* (not entire) cost of litigation, expenses and attorney's fees; (6) *reasonably* incurred. (emphasis added).

There was no determination by this court that Appellants acted Unreasonably *and* Vexatiously. Nothing in the record supports this finding. The court merely contended that Mr. Aham entered his appearance, and that such entry prolonged a frivolous litigation. The undersigned Appellants respectfully submit that the District Court's finding of mere bad faith is neither what the letter nor the spirit of §1927 intended.

Courts in every circuit in this country are unanimous in requiring that an imposition of sanctions under §1927 meet more than a mere finding of bad faith. It must include a *clear showing* of *willful bad faith* on the part of the offending attorney. *Ford v. Temple Hospital*, 790 F.2d 342, 347 (3d Cir. 1986); *Baker Industries, Inc. v. Cerberus, Ltd.*, 764 F.2d 204, 209 (3d Cir. 1986). In the words of the *Ford* Court, the leading case in the Third Circuit on §1927—a decision which the District Court ironically relied on as its basis:

> What would be an indication of bad faith in a case as this one, would be *some indication* of an *intentional* advancement of a baseless contention that was made for *ulterior purpose*, e.g., harassment or delay. *Ford* 790 F.2d at 347 (citing *Baker Industries, Inc. v. Cerberus, Ltd.*, 764 F.2d 204, 223 (3d Cir. 1985) (Higginbotham, J., dissenting).

No such covert intention to abuse, delay or harass exists on the part of Mr. Aham or his co-counsel, Mr. Tache. None has been shown. None can be shown. There is nothing in the record to support such a finding.

To clear all doubt that more than mere bad faith is required, the Court in *Dreiling v. Peugeot Motors of America, Inc.*, 850 F.2d 1373 (10th Cir. 1988) states, for example, that bad faith requires more than a showing of a weak or legally inadequate case, and more than a finding of negligence, *frivolity* or improvidence. *Id.* 850 F.2d at 1383. A case for a mere bad faith has not been made out let alone that of a willful or intentional bad faith. Furthermore, Appellants respectfully submit that not only is the Court's finding of mere bad faith in clear error, the assertion by the District Court that it is within its discretion to find bad faith is also clearly erroneous. By stating that it has the discretion to find bad faith, the District court is reversing the simple teaching of 1927 and the well-established ruling in case law in the Third Circuit and other circuits governing the imposition of sanctions on attorneys. Appellants respectfully submit that a finding of bad faith—willful or intentional bad faith—is a mandatory requirement.[36] In other words, any reasonable person ought to be able to find that the offending attorney's conduct was willfully or intentionally exercised in bad faith such as to attach some punitive consequences.

Further, Appellants submit that only after bad faith—willful bad faith—has been mandatorily and conclusively established, does the discretion of the judge to impose sanctions arise[37]; for a judge may decide that despite a finding of willful bad faith, no sanctions will be imposed in order to preserve creativity of attorneys. *Ford, supra*, at 347. It is, therefore, not discretionary for the District Court to find bad faith. That finding, it is submitted, must be done as a matter of law. And even then, to properly exercise this discretion after mandatory bad faith has been found, the District Court *must* balance the equities between the parties and *may* award attorney's fees whenever overwhelming considerations indicate the need for such a recovery. *Ford, supra*, at 347. In the case at bar, no such mandatory balancing of equities took place, none whatsoever. And in any case, what overwhelming considerations here dictate the need to have lawyers for a plaintiff who possibly has already lost his money to a defrauder be punished further. What balancing of equities allows sanctions against a party who has potentially a legitimate claim, and whose only fault was to try to verify proper title to the cargo he bought. Plaintiff, it should be again stressed, agreed to vacate the "Vytina" only on condition that BP/Sohio was solvent enough to pay whichever party prevails. Rather than implying an act of bad faith, such actions manifest an abundance of goodwill and extreme reasonableness.

Indeed, the need for restraint in a very sensitive area of the law cannot be over-emphasized. Courts in this jurisdiction and others have long recognized that if it were left in the discretion of any judge to find mere bad faith and on that basis impose sanctions on the offending attorney, the potential for abuse will be unimaginable. *See* e.g., *Ford, supra,* at 346-47. Because sanctions whether under 1927, Rule 11 or on any other basis, are penal in nature and could be economically punishing as well as professionally harmful, Lower Courts have been urged to be sensitive to their impacts on attorneys. *See Oliveri* 803 F.2d at 1280. In this regard, it has been stressed that statutes and rules imposing sanctions on attorneys be strictly and narrowly construed and with great caution, lest an uncritical interpretation stifles enthusiasm or chills creativity and affects an attorney's legitimate ethical obligation to represent his client zealously. *Ford, supra,* at 349; *Mone v. C.I.R.*, 774 F.2d 570 (2nd Cir. 1985). In addition, it has been stressed that any and all doubts be resolved in the light most favorable to the parties being sanctioned. *Oliveri*, at 1275. The discretionary powers to impose sanctions pursuant to §1927, the *Ford* court has stated, should be exercised only in instances evidencing egregious or "serious and studied disregard for the orderly process of justice." *Id.* at 347.

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[36] 36 28 U.S.C. §1927; *Ford v. Temple Hospital*, 790 F.2d at 347.

[37] *see Ford, supra* at 347.

Despite the presence of these principles, rulings, holdings and the frequency of their admonitions, particularly suited for a case such as is presently at bar, the District Court in this case rushed head long and uncritically, to impose sanctions premised on what Appellants believe to be an erroneous reading of §1927 and the cases elucidating that statute. In failing to examine all the possible theories under which Appellants' case could have been brought and in what appears to be a predisposed attitude of the Court below toward sanctions from the beginning, the District Court abused its discretion.

Applying the above-stated rules to the basis of the District Court's imposition of §1927 sanctions, it becomes clear that: 1. Appellant, L. Obioma Aham, was sanctioned merely for entering his appearance on behalf of the Plaintiff. Since Mr. Aham is a member in good standing of both the bars of Pennsylvania and of the Eastern District and entered his appearance pursuant to the right appertaining thereto in the reasonable belief that his case was well-grounded in fact and supported by existing law. The mere declaration thus that his appearance prolonged a frivolous suit is just that—a mere declaration. Such declaration again, however, is prejudicial to the interests of the Appellants in that it was intended solely to make Appellants amenable for sanction, there being no support for such declaration in the record.

Appellants respectfully reiterate here that Mr. Aham entered his appearance solely for the purpose of effective advocacy mandated by the Rules of Professional Responsibility. There were several defense attorneys in the case, all contributing to their overall effectiveness. Mr. Aham and the Plaintiff and even Mr. Tache felt that two heads would be better than one, and Mr. Aham was encouraged to enter his appearance as he was entitled to as of right. Appellants respectfully contend that the suggestion by the District Court of an ulterior motive for Mr. Aham's Entry of Appearance other than what has been presented here has no basis and at the very least would require corroboration. The mere assertion that such entry prolonged this litigation or constituted abusive or dilatory tactics without conclusive Proof to that effect or that Mr. Aham knew and believed his case was frivolous and yet continued to pursue it merely to vex defendants and raise expenses, is not grounds for sanctions. Such naked declarations do violence to the system of justice by allowing impermissible conjecturing by triers of facts. It is fraught with difficulties not the least of which is the deleterious potential for a pernicious chill of the right to zealous advocacy of the attorney.

2. *The Conditions Under which the "Vytina" was Vacated*

Appellants respectfully submit that while it is true that the entry of appearance came in the wake of the vacation of the Order detaining the "Vytina", however, the implication of the underscored word *after* [J.Appx. 16a] by the District Court suggests that Mr. Aham should have known that his case was frivolous but entered anyway. This statement was obviously taken out of the context in which the vacation of the "Vytina" occurred. It is yet again a prime example of how the Court has sought to make Appellants legally malleable for sanctions. It represents a distortion of what transpired in that proceeding and thus a clear abuse of the District Court's discretion.

The "Vytina" was vacated pursuant to an *agreement* reached by both sides under which: (1) Addax and British Petroleum would voluntarily accept the jurisdiction of the Court; (2) Addax was ordered to use all necessary and available means to produce its original documents in the next day or two so that both parties can have the benefit of comparison, (3) Further, discovery of both the Plaintiff's and Defendants' documents was ordered to commence immediately; (4) Finally, Plaintiff accepted the vacation of the "Vytina" on the mere condition that British Petroleum was "solvent" enough to pay the eventual rightful owner for the cost of the cargo. [J.Appx. 3a] [Emphasis added] Security was waived by both parties since detention of the ship was no longer at issue.

At the time of the vacation of the Vytina, Plaintiff had his documents, ready, willing and waiting; Addax's original papers never came until three weeks later. The Honorable Judge Bechtle, exercising his discretion, declined to allow Defendants to comply with the Order of Judge Shapiro. Instead of the two or three days Judge Shapiro mandated, the Court below allowed Defendants the three week period which they argued they would need. [J.Appx. 1057a] The Court below rejected the very reasonable proposition of

Judge Shapiro. By so doing, the Court itself was responsible for dilating and multiplying the proceedings, the very offense for which it now seeks to punish Appellants. Had the District Court been receptive to the very reasonable suggestion of Judge Shapiro to use every available means, including Concord Jet, to get the papers here, this case may not have lasted long. But by encouraging the intransigence of the Defendants and now seeking to punish Appellants for it, the Court below abused its discretion.

Obviously, the condition under which the "Vytina" was vacated rather than suggesting that Plaintiff had no claim *ab initio*, gave Plaintiff hope in that Judge Shapiro listening to the same argument which Defendants re-argued over and over before the Honorable Judge Bechtle, came away with the impression that the Nigerians were trying to sell the cargo to two or more parties, even if that selling included trying to defraud one of them. It took a matter of minutes for Honorable Judge Shapiro to come to this conclusion or at least begin to ponder the role of the Nigerian officials. The District Court Below, according to the Ruling of April 27, 1990, obviously saw it differently. After over one year of pondering the issue, it still was not able to deal with the question of the role of the NNPC officials and the defrauders. Indeed, if anything, the difference in this perception simply means that reasonable minds can differ as they did here. This, however, was not a sufficient basis to sanction the Appellants. By ascribing to the Plaintiff and his attorneys an intention which never existed, again the Court below thus seems to be punishing them merely for participating in a case which they legitimately could bring. The *Oliveri* Court which the District Court cited several times, has stated that the District Court's findings *must* meet a "high degree of specificity" before an award made pursuant to 1927 can attach. *Id.* at 1227. Speaking in general and nebulous terms, like mere "entry of appearance" in this case, without further evidence of willful bad faith, will not suffice to meet that "high degree of specificity" required for sanctions under 1927. More is required. Failure thus, to meet this standard was clear error.

3. Time of the Essence

Regarding the "time of the essence" argument raised by the April 27, 1990 decision wherein the District Court stated that Mr. Aham was not working under the alleged time constraints impacting on Mr. Tache's claim, [J.Appx. 16a] Appellants respectfully submit that they do not intend now and have never claimed that time was of the essence with regard to the entry of appearance by Mr. Aham. However, without prejudice to Appellants' experience and investigation done before the seizure of the "Vytina", the Appellants maintain that time was of the essence when the complaint was filed. In any case, there is a certain illogicality to this argument. Having denied the validity of such a valid claim in the case of Mr. Tache—a situation which, by the way, the Honorable Judge Shapiro acknowledged and which the District Court itself also acknowledged[38]—the District Court now seeks to resurrect that particular argument for the sole purpose of showing that Mr. Aham was continuing a frivolous suit. Having eaten its proverbial cake by denying that time was of the essence with regard to Mr. Tache, the Court now wants to have its cake back by resurrecting the validity of a claim it had already denied existed. Moreover, even if Mr. Aham entered his appearance when Mr. Tache did, the outcome of the April 27, 1990 decision clearly shows that it would not have mattered. Mr. Aham would have been denied the time of the essence argument just as easily as it was denied in Mr. Tache's case. The absurdity of the District Court's ruling becomes clearly visible in the time of the essence argument when one considers again that Mr. Tache had only two non-working days to file the complaint--Saturday and Sunday. Such a ruling hardly squares with the realities of the working world. It is really a *reductio ad absurdum*, and thus an abuse of discretion to have so held.

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[38] When she stated during the emergency hearing before her that Mr. Tache can be excused for using the "scatter gun approach" in naming all the Defendants listed on the original Complaint because time was of the essence.

4. Continuing a frivolous claim and abusive tactics.

The undersigned Appellants respectfully deny that they continued this case in any manner which could be deemed an abusive or dilatory tactic. Both Plaintiff and his counsel stated time and time again that they were only interested in verifying correct ownership to cargo and in resolving this case as summarily as possible. For this reason, Appellants accepted a meager grantee in form of a mere acknowledgment that BP/Sohio will pay the rightful owner of the document whenever that was determined. Nothing Appellants did could be construed as interfering with Defendants' rights or creating the sort of havoc which the Court and Defendants have sought to pin on Appellants, other than getting their attention and having access to the benefit of comparing both parties' papers. The only cause of the prolongation of the suit, if it ever was that, was because the Defendants did not have their original papers and the District Court instead of allowing the Order of Judge Shapiro calling for an expedited delivery of documents, gave them more time.

Appellants submit that it is manifestly unjust and contrary to the well-established "American Rule" requiring parties to a litigation to bear their own cost, to impose upon Plaintiff and his representatives, the costs, expenses and attorneys fees of the entire litigation which were unreasonably incurred, or incurred in anticipation of litigation. *See* 28 U.S.C. §1927. If as Defendants and the District Court have contended, it could be argued that Plaintiff's claim was frivolous *ab initio*, then it is manifestly unreasonable for Defendants to have continued running up costs, expenses and attorney's fees for over one year simply to defend against what they claim was a "patently frivolous" suit.

Indeed, the *Oliveri* and *Napier* Courts have recognized that such defense of "patently frivolous" suit is manifestly unreasoned and unreasonable. Thus the Court in *Oliveri* has proclaimed that:

> As a general principle, it would be inequitable to permit a defendant to increase the amount of attorney's fees recovery as a sanction by unnecessarily defending frivolous claims which could have been dismissed on motion without incurring the additional expense.

Id. 803 F.2d at 1280.

This Honorable Court in *Napier* carried this principle further by imposing a duty on defendants and victims of alleged frivolous suits to mitigate their damages and expenses and to use all reasonable means to resolve and terminate frivolous issues quickly and efficiently in order to prevent frivolous suits from becoming excessive.[39] Failure of the District Court in *Napier* to assess the reasonableness of the fee and costs in light of these principles was deemed an abuse of discretion. Id. at 1083.

In the imposition of sanctions in the case at bar, not only did the District Court fail to balance the equities, it also failed to assess the reasonableness of the fee and costs in light of the principles enunciated by this Honorable Court. The District Court ignored the well established body of law dealing with sanctions and instead fashioned a rule imposing upon Appellants ruinous sanctions based on the caprice and whims. Such arbitrariness, Appellants submit, amounts to an abuse of discretion and therefore should be reversed.

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[39] *see Dubisky v. Owens*, 84 F.2d 1034, 1037 (7th Cir. 1988); *Gaiardo*, 835 F.2d at 483 (holding that duty of mitigation should minimize any excessive burden on the sanctioned party).

Finally, the undersigned Appellants submit that the District Court's anger towards Plaintiff, John Indakwa, evidenced by the strong denuncitory language lavished on him, [J.Appx. 17a] no doubt affected the perception of his attorneys as well. By so doing, the Court below failed to follow the admonitions of the *Oliveri* Court that:

> to impose monetary sanctions on an attorney on the ground that his client is not worthy of belief, goes too far. 1927 [we are reminded] was not intended to require an attorney to pass judgment on the credibility of his client on pain of a monetary sanction in the form of paying adversaries' attorney's fees . . . Preservation of the attorney-client relationship, as well as the language of §1927 that sanctions only unreasonable and vexatious conduct require a cautious approach toward any claim of sanctions grounded on issues of credibility. *Oliveri*, 803 F.2d at 1277-78.

Finally, as to §1927, Appellants respectfully submit that the entry of appearance of Mr. Aham was pursuant to as a lawful right. Entry of appearance was neither unreasonable nor vexatious. No basis exists in this case for reaching a contrary conclusion. Appellants' conduct was reasonable at all material times herein. Appellants took no action that could be truly called "continuing this case". All actions after the dismissal of the claim being defensive in nature and in response to defense Motions. To have withdrawn from their case when there were plausible alternative theories under which they could have been pursued, would have been tantamount to a breach of Plaintiff's attorneys' ethical obligation to the client and the duty of zealous advocacy within the bounds of law mandated by the Code of Professional Responsibility. Appellants thus violated neither the Letter nor the Spirit of §1927.

CONCLUSION

For all the foregoing reasons, Appellants respectfully request that: 1. The Order of April 27, 1990, imposing sanctions on them be vacated in its entirety; 2. Appellants be awarded the costs and attorneys fees for defending for nearly two years this distractive and ruinous but biased motion for sanctions; 3. The Motion for Summary Judgment granted in favor of Defendants be overturned; and 4. This Honorable Court consider appropriate sanctions against Defendants and their representatives for abuse of the judicial process.

Respectfully submitted,

By: /s/ L. Obioma Aham
L. Obioma Aham, Esquire

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ADDENDUM

DEFENDANTS-APPELLEE'S COSTS, EXPENSES AND ATTORNEY'S FEES ASSESSED AGAINST APPELLANTS FOR ALLEGED RULE 11 OF F.R.C.P. AND 1927 OF 28 U.S.C. VIOLATION, FROM MARCH 13, 1989 TO APRIL 27, 1990.

	Costs Attributed to Mr. Ahamn	**Total costs submitted per Order of April 27, 1990 Tache, Indakwa**
1. British Petroleum/Sohio		
1. Ladner, Clark Fortenbach & Young (James Johnson, Esq.)	$31,866.43	$41,000.99
2. ADDAX OVERSEAS, S.A.		
1. Haight Gardner, Poor & Haven (Donald Kennedy, Esq.)	$57,234.14	$58,517.89
2. Mattioni, Mattioni, Mattioni, Ltd. (Faustino Mattioni, Esq.)	$18,126.93	$20,360.07
3. Palime Navigation, Co.		$66,878.56
1. Poles, Tubin, Patestides & Stratakis	$17,770.31	$29,265.26
2. Krusen, Evans & Bryne (Mary Elisa Reeves)	$ 9,494.25	$15,423.97
4. Rice Unruh (Sam Dorio)		
1. Ballard, Spahr, Andrews		$16,086.00
& Ingersoll (Brendon Collins, Esq.)	$ 2,303.00	$ 2,610.00

TOTAL COST ATTRIBUTED To Mr. Aham: $136,795.06

TOTAL COST Per Order: $250,142.68

APPENDIX R

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 90-1886

CTC IMPORTS EXPORTS, et al.
Appellants
vs.
NIGERIAN NATIONAL PETROLEUM CORP., et al.
Appellees

BRIEF OF APPELLANT
SIMON W. TACHE, ESQUIRE

[TABLE OF CONTENTS AND AUTHORITIES OMITTED IN THIS PRINTING]

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Jurisdiction in the District Court was based on the subject matter: Admiralty, and on Diversity of Citizenship, 28 U.S.C. §1332 and this appeal is being taken pursuant to 28 U.S.C. §1291.

ISSUES PRESENTED

1. Whether the District Court abused its discretion in holding that Appellant, Simon W. Tache, Esquire, violated Rule 11 of the Federal Rules of Civil Procedure when title to the cargo of the M/V "Vytina" remains in dispute to date?

2. Whether the District Court erred in its application of the standard for ruling on attorney's pre-filing inquiry

in view of the clear standard articulated by this Court in *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 95 (3d Cir. 1988)?

3. Whether the District Court abused its discretion in holding that Appellant, Obioma Aham, Esquire, violated Rule 11 of the Federal Rules of Civil Procedure when title to the cargo of the M/V "Vytina" remains in dispute to date?

4. Whether the District Court erred in holding that Appellant, Obioma Aham, Esquire's conduct in the prosecution of this matter violated 28 U.S.C. §1928?

5. Whether the Defendants' documentation to title of the cargo aboard the M/V "Vytina" on January 13, 1989, was so clear and compelling to vitiate Plaintiff's claim and justify the grant of summary judgment?

STATEMENT OF CASE

1. Proceedings and Rulings Below

This action was brought in Admiralty for the arrest of the vessel "M/V Vytina" on March 11, 1989, by Plaintiff, CTC Imports and Exports, a Texas Corporation, in the United States District Court for the Eastern District of Pennsylvania. [J.Appx. 21a-49a] The "Vytina" was carrying approximately 773,398 barrels of Nigerian (Bonny light) sweet crude oil. [J.Appx. 38a] The vessel was arrested on March 13, 1989, by the U.S. Marshals. [J.Appx. 48a-49a] The present Defendants in this case are: The Nigerian National Petroleum Corporation (NNPC), Gulf Shipping Agency (Nigeria), British Petroleum (BP), and/or its subsidiary corporation Sohio Supply Company ("Sohio"), Addax Overseas, S.A. ("Addax"), and Palime Navigation Company (Palime). [J.Appx. 21a]

Plaintiff's brought this action on the theory that the cargo aboard the "Vytina" was consigned to him and was diverted by British Petroleum to its loading port at Marcus

Hook Pennsylvania. Plaintiff based this assertion on the fact that at the time the vessel was arrested, neither British Petroleum nor the vessel was scheduled to arrive at the United States Gulf Coast on March 10, 1989. [J.Appx. 31a] When the Plaintiff's representative inquired with port authorities in Houston, he was informed that the vessel was heading for Philadelphia instead. Morever, Sohio was not the original buyer of the oil in Nigeria and had no contract nor title documents from anybody in Nigeria.

Finding no cooperation in verifying rightful ownership to the cargo aboard the "Vytina", Plaintiff sought legal action by temporarily detaining the "Vytina", just sufficiently to enable him to verify the dispute over title to the cargo. Plaintiff's alternative theory was that he was co-owner of the cargo aboard the Vytina. Finding no cooperation by anyone who laid claim to superior title. Plaintiff sought to seize the shipping in the event that nobody possessed a better title than himself. The last theory on which Plaintiff's case was to have been made involved fraud. Under this theory, Plaintiff was prepared to assert ownership to cargo of an entity—NNPC, that was trying to defraud him.

The District Court, the Honorable Norma Shapiro presiding, meeting in an emergency proceeding on March 15, 1989, vacated the arrest of the "Vytina" by an agreement reached by both parties. Discovery of both Defendants' witnesses and Plaintiff's witnesses was ordered to commence immediately. [J.Appx. 3a] The Defendants never complied with Judge Shapiro's Order, but instead filed a Motion for Summary Judgment and for Sanctions against Plaintiff's attorneys, Simon W. Tache, Esquire, and L. Obioma Aham, Esquire, even before producing the papers entitling them to the cargo. [J.Appx. 154a] Plaintiff convened an emergency hearing to force compliance with the Honorable Judge Shapiro's Order, but the Honorable Louis Bechtle denied Plaintiff's request and also the request to comply with the Order mandating discovery. The Honorable Louis Bechtle allowed Defendants three weeks to produce their papers instead of the two days allowed by the Honorable Shapiro, thus stretching the time necessary for a quick resolution of the case. [J.Appx. 1057] On March 27, 1989, the Defendant filed a Motion for Summary Judgment and for Sanctions against Plaintiff and its attorneys. The Motion was heard on the 30th of March. The District Court, while refusing to grant a Motion for Summary Judgment because Plaintiff had not complied with the requirements of the defense of that action, nonetheless granted a dismissal of Plaintiff's suit for failure to comply with the requirements of verification of a Complaint pursuant to Admiralty Rule of Procedure C(2). [J.Appx. 5a] Unable to contact the Plaintiff, despite numerous attempts, in order to comply with Judge Bechtle's order of March 31, 1989, Appellant withdrew from participating in the Plaintiff's case on November 13, 1989. [J.Appx. 276a]

On April 27, 1990, over one year after the case commenced, the District Court granted the Defendants' Motion for Summary Judgment, dismissing the claim on the merit.] Further, the Court rules inter alia that Appellant, Simon W. Tache, Esquire's prefiling inquiry had violated Rule 11 of the Federal Rules of Civil Procedure dealing with commencement of frivolous suits. [J.Appx. 13a]

On May 9, 1990, Simon W. Tache, Esquire, filed a Motion for Reconsideration and for Relief from the April 27, 1990, Order imposing sanctions on him. [J.Appx. 271a] L. Obioma Aham, Esquire, likewise filed a similar Motion on July 2, 1990. On October 22, 1990, the District Court denied jointly the Motions without an opinion. [J.Appx. 347a] Hence, this appeal followed.

STATEMENT OF FACTS

On March 10, 1989,at approximately 11:00 p.m., Appellant Simon W. Tache, Esquire, received a telephone call from L. Obioma Aham, Esquire, from Houston, Texas. Mr.

Aham requested my assistance in detaining and preventing the vessel M/V "Vytina" from off-loading its cargo. Mr. Aham advised me that the Plaintiff, CTC had purchased crude oil from the Nigerian National Petroleum Corporation (NNPC) to be delivered in the Gulf Coast of the United States. Mr. Aham indicated that the Plaintiff had just been advised that the vessel was being diverted to Philadelphia with its cargo. He explained that he had examined the documentation presented by the Plaintiff and after a careful investigation was of the professional opinion that the Plaintiff indeed had good title to the cargo. [J.Appx. 273a-274a]

Mr. Aham advised me that he was an attorney and that he needed my assistance as local counsel to protect the rights of the Plaintiff. At this point Appellant, Simon W. Tache, Esquire, advised Mr. Aham that if the information that he has provided is true., the Appellant would like direct contact with the Plaintiff and the documents as to proof of title. I advised Mr. Aham that the documents could be faxed to our offices so that we could begin research while the originals are federal expressed. Mr. Aham put me in touch with Mr. Indakwa, the President of CTC. Mr. Indakwa advised me that he had just come from Nigeria, where he bought the crude oil that was presently loaded aboard the M/V "Vytina". He indicated that he was in Nigeria when the vessel was loaded and documents of title transferred to him. He assured me that his papers were authentic and that they had been reviewed by other persons in the industry and had been determined to be authentic. [J.Appx. 275a, 433a-465a]

On Saturday, March 11, 1989, I summoned three of my staff members to the office, and we began research to determine the exact location of the vessel and its cargo and to see if the characteristics of both the vessel and its cargo were consistent with the documents that the Plaintiff had forwarded to me. Everything about the vessel, its cargo and port of discharge was consistent with the

Plaintiff, CTC's documents. [J.Appx. 29a-40a] In fact, the only inconsistent element about the information available to Appellant, Simon W. Tache, on March 11, 1989, was the presence of the vessel in Philadelphia rather than in the Gulf Coast.

Attempts to reach the Nigerian authorities proved fruitless. The vessel was scheduled to arrive in Philadelphia on March 11, 1989. Knowing that the discharge of crude oil can be done in a relatively short span of time, time became of the essence. Relying on the investigation conducted by Mr. Aham, the assurances of the President of CTC, Dr. Indakwa, and Appellant's own verification of this information, the undersigned Appellant initiated pleadings for the arrest of the vessel. At 4:00 p.m. on March 11, 1989, Appellant was advised by the Coast Guard that the vessel would dock in Philadelphia at Marcus Hook on Sunday, March 12, 1989. Satisfied that the documents presented by the Plaintiff indeed conferred on it title to the cargo aboard the "Vytina", Appellant requested an emergency order for the arrest of the "Vytina" on March 12, 1989. Either because of weather or for some reason unknown to Appellant,the vessel, which had been at Big Stone since March 10, 1989, did not arrive in Philadelphia until March 13, 1989, when it was arrested.

At no time during this period was Appellant, Simon W. Tache, ever advised of Plaintiff's involvement in any fraudulent transaction, nor was this Appellant aware that the Plaintiff had been warned that his documents may be forged. While the other Defendants purported to lay claim to the cargo aboard the "Vytina", at not point during this time did any of them produce any authentic document or documentation to substantiate their claim of the cargo aboard the "Vytina". After March 13, 1989, it became apparent to the undersigned Appellant that title to the cargo aboard the "Vytina" was in dispute. In order to clarify the modeled picture, the parties deposed the Captain of the vessel on March 16, 1989. [J.Appx. 279a]

At his deposition, the Captain testified that he did not sign the documents in possession of the Plaintiff. Although the testimony of the Captain raised a flag of concern to the undersigned Appellant, there were serious discrepancies in the Captain's testimony and a lack of consistency in the Defendants' documents. However, this Appellant could not totally disregard the Captain's testimony, hence the decision not to be involved in the prosecution of the case unless the Plaintiff complied with Judge Bechtle's Order of March 21, 1989 by posting security. [J.Appx. 5a]

My decision to terminate my involvement in the representation of the Plaintiff was not an indication of a belief in the fraudulent nature of Plaintiff's documentation, but rather on the professional conclusion that at the very least, Plaintiff's title had been tainted. Thus, it was professionally and practically impossible for me to continue to represent the Plaintiff, even if the Defendants' title was also defective.

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no other related cases and proceedings involved in this dispute now before this Court.

STATEMENT OF STANDARD OR SCOPE OF REVIEW

The scope of review applicable to this case is abuse of discretion by the Lower Court on the use of Federal Rules of Civil Procedure, Rule 11 sanctions and error by the District Court in its application of the standard for imposition of those sanctions.

SUMMARY OF ARGUMENT

The District Court erred and improperly ruled that Appellant, Simon W. Tache's signing of the Complaint filed in this matter violated Rule 11 of the Federal Rules of Civil Procedure. This Court has held that in order for Rule

11 sanctions to be imposed, there must be no basis in fact or in law to bring a cause of action. Given the facts of this case as known to the undersigned Appellant on March 10, 1989, through March 12, 1989, it was clear that the Plaintiff was the rightful owner of the cargo aboard the "Vytina". It was clear that the vessel, which by its own documents and all documents produced, was scheduled to arrive in the Gulf Coast had been diverted to Philadelphia without the knowledge of the Plaintiff. It was also clear that the cargo was diverted to Philadelphia by someone without the Plaintiff's knowledge. It was also clear that to the extent the Plaintiff did not know the reasons behind the diversion, that he may have been the victim of a fraud. Even if the cargo aboard the "Vytina" had been sold to some other person as well as the Plaintiff, it was clear to this Appellant that Plaintiff was part owner of that cargo. Therefore, as a matter of law, the Plaintiff had various theories, supportable by the facts, including breach of contract, fraudulent conveyance, and disputed title over cargo.

Factually, undersigned Appellant had in his possession documents from both the referring counsel and the Plaintiff which were sufficient under any legal theory to convey title to the Plaintiff. The Plaintiff had just returned from Nigeria. The Plaintiff said he bought the oil from the NNPC. The Plaintiff and referring counsel confirmed authenticity of Plaintiff's documents. When this Appellant received the documents regarding the cargo aboard the "Vytina", the vessel was already at Big Stone Key. Appellant had just Saturday in which to complete research, confirm investigation of both Plaintiff and referring counsel and prepare the pleadings. The vessel was scheduled to arrive in Philadelphia on March 12, 1989. Given the qualifications and background of the Plaintiff, the extensive investigation conducted by referring counsel and the exigencies of the circumstances, the undersigned Appellant acted as any reasonably prudent attorney would. In fact, both Judge Shapiro and Judge Bechtle recognized the conditions under which this Appellant was operating as time was of the essence. This Appellant has reviewed these events repeatedly and is unable to understand the conclusion of the Lower Court that this Appellant's pre-filing investigation was woefully inadequate.

This Appellant has incurred over $20,000.00 (Twenty Thousand Dollars) in out-of-pocket expenditures, not including the time and services of three staff members. A review of this record will show that the Lower Court's ruling that this Appellant violated Rule 11 was clearly in error. Given that time was of the essence, Appellant was operating within the confines of rapidly changing events. the reliance of apparently authentic documents from the client, assurances from the client and referring counsel, and the plausibility of the legal position supported by these facts, there can be no other conclusion but that this Appellant acted in a reasonable and professional manner.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN HOLDING THAT APPELLANT, SIMON W. TACHE, ESQUIRE, VIOLATED RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE WHEN THE FACTUAL EVIDENCE AND THE LEGAL THEORIES DEMONSTRATE THAT TITLE TO THE CARGO OF THE M/V "VYTINA" WAS AND REMAINS IN DISPUTE SINCE MARCH 10, 1989.

A. The imposition of Rule 11 sanctions on Appellant, Simon W. Tache, by the lower court, is unsupported by the facts and existing law.

In ruling that Appellant violated Rule 11 of the Federal Rules of Civil Procedure, the lower court stated:

> In this case, the court finds that the pre-filing inquiry conducted by Plaintiff's co-counsel, L.O. Aham, Esquire and Simon Tache, Esquire, was

> woefully inadequate and that sanctions are required. [J.Appx. 13a]

This ruling, according to the court, was based on the following facts:

1. The name of the master and the seal of the "Vytina" on Plaintiff's bill of lading is plainly different from that of the actual master and ship's seal.

2. Plaintiff's documents showed that the "Vytina" loaded the cargo of oil on February 25 and February 26 and that the bill of lading was executed by the master on February 26; whereas, the vessel actually left Nigeria on February 24.

3. The Plaintiff failed to offer any documentation evidencing charter of the "Vytina" or financing for the purchase of oil with a market value in excess of $16,000.000.

4. The Plaintiff had been advised by the International Chamber of Commerce investigator that his documents were forgeries prior to the filing of the complaint and arresting of the vessel.

5. Plaintiff had laid claim to a cargo of Nigerian crude onboard the M/T "Barbro" as recently as February 6, 1989. [J.Appx. 13a-14a]

As will be shown later, none of these facts, even if supportable, justify the imposition of Rule 11 sanctions upon this Appellant.

Rule 11 of the Federal Rules of Civil Procedure requires that by signing a pleading, motion or other paper, an attorney or party certifies that to the best of his knowledge, information and belief form after reasonable inquiry it is well-grounded in fact and warranted by the existing law or a good faith argument for the extension, modification, or reversal of the existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Rule 11 provides:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law, and that is is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The purpose of Rule 11, as this Honorable Court has stated, is to discourage pleadings that are frivolous, legally unreasonable or without factual foundation. *Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 157 (3d Cir. 1986); *Nappier v. Thirty or More Unidentified Agents*, 855 F.2d 1080, 1090-1091 (3rd Cir. 1988).

The Third Circuit's standard for testing conduct under Rule 11 is an objective "reasonableness under the circumstances". *Gairdo v. Ethyl Corp.*, 835 F.2d 479, 482 (3d Cir. 1987); *Nappier, supra* at 1091; *Teamster Local Union No. 430 v. Cement Express, Inc.*, 841 F.2d 66, 68 (3d Cir. 1988); *Eavenson, Auchnuty & Greenwald v. Holtzman*, 775 F.2d 535, 540 (3d Cir. 1985).

In determining the reasonableness of an attorney's prefiling inquiry, the District Court, it is said, must consider four factors:

(1) The amount of time available to the signer for conducting relevant factual and legal investigation;
(2) The necessity for reliance on a client for underlying factual information.

(3) Whether the case was referred to the signer by another member of the bar; and

(4) The plausibility of the legal position advocated.

Mary Ann Pensioero, Inc. v. Lingle, 847 F.2d 90, 95 (3d Cir. 1988); *Matthews v. Freedom*, 128 F.R.D. 194, 197 (E.D. Pa. 1989); Fed. Rules Civ. Proc. 11, Notes of the Advisory Committee.

The Third Circuit has repeatedly cautioned that District Courts should avoid using the wisdom of hindsight and should test the signer's conduct by asking *what was reasonable to believe at the time the pleading was submitted. Teamsters, supra.* (Emphasis added). The currect Rule 11 inquiry the District Court should make, this Honorable Court said in *Lingle*, is whether at the time the signing attorney filed the complaint, he could *reasonably* have argued in support of his *legal theory. Lingle*, 847 F.2d at 96. (Emphasis added). Additionally, *any* and *all doubts* it is stressed must be resolved in favor of the signer. *Eastway Construction Corp. v.City of New York*, 762 F.2d 243, 254 (Emphasis added).

Only where it is *patently clear* that a claim has *absolutely no chance* of success under the existing precedents, and where *no reasonable argument* can be advanced to *extend, modify* or *reverse* the law as it stands, will Rule 11 have been violated. *Id.* (Emphasis added).

Applying these principles to the case at bar, there can be no other conclusion by that the Appellant's conduct was reasonable under the circumstances and not violative of Rule 11 of the Federal Rules of Civil Procedure.

B. The District Court erred in its application of the standard for ruling on attorney's pre-filing inquiry in view of the clear standard articulated by this Court in Lingle.

1. The Available Time

The facts show that L. Obioma Aham, Esquire, investigated the facts surrounding Plaintiff's claim, consulted others in the industry regarding the authencity of Plaintiff's documents and assured the Appellant of these facts. The Appellant independently evaluated the case with the Plaintiff and received assurances from the Plaintiff about the genuiness of his claim. Mr. Aham conducted both a factual and legal investigation of the case. Mr. Aham is a member of the Pennsylvania Bar. He requested my assistance in the handling of this case and forwarded appropriate documentation regarding Plaintiff's title to the cargo aboard the "Vytina" to the Appellant on Saturday morning, March 11, 1989.

Plaintiff, John Indawka, is very educated and assured the Appellant of the authencity of the documents evidencing him claim to the cargo of the "Vytina". The vessel was scheduled to arrive in Philadelphia on March 12, 1989. As such, Appellant had less than twenty-four hours to verify Plaintiff's claim, and prepare appropriate pleadings. Despite the time constraint, Appellant cross-referenced the contents of the Plaintiff's documents to the location of the vessel, the vessel designation, and its cargo. This process confirmed that Plaintiff was indeed the owner of the cargo aboard the "Vytina".

It must be emphasized that the vessel was at Big Stone Key on March 11, 1989 and scheduled to arrive in Philadelphia on March 12, 1989. Thus, Appellant' reasonable inquiry, verification and research were conducted within a span of less than twenty-four hours. These twenty-four hours, as has been noted, fall between Saturday and Sunday. Besides, the "Vytina" had already begun to discharge some of its cargo and from all indications, the vessel was going to discharge its charge and leave the jurisdiction unless Appellant acted expeditiously. Time was indeed of the essence when the case was referred to the Appellant and time most definitely was of the essence when Appellant filed the Complaint with the Court on March 12, 1989.

2. The necessity for Reliance on a Client for underlying factual information

Although complete reliance on a client for all the information and investigation necessary to commence a suit is unprofessional and outright neglect, the facts of this case compel a good measure of reliance. The necessity for reliance on the client for factual information was essential in this case since the Plaintiff himself was physically in Nigeria when the vessel was loaded. The information regarding his claim is very well documented and had been confirmed by independent observers to be authentic. the Plaintiff is well educated, very knowledgeable and experienced in matters of international trade.

Of course, counsel did more than rely on Plaintiff's accounts. The client documents, as presented to Appellant, included:

1. Assignment of charter agreement by Gulf Agency and Shipping (Nigeria Ltd.) to the Plaintiff [J.Appx. 29a];
2. Bill of lading from NNPC suppliers of crude oil to CTC Imports and Exports [J.Appx. 31a];
3. Master's receipts for documents [J.Appx. 33a];
4. Cargo manifest [J.Appx. 35a];
5. Certificate of Quality [J.Appx. 37a];
6. Certificate of Quality [J.Appx 38a-40a];

These documents were examined by both referring counsel, independent person in the industry and Appellant. The documents were verified against the ship, its cargo and maritime practices and deemed to confer title upon the Plaintiff.

As indicated earlier, the lower court based its ruling on the following facts:

1. The name of the master and the seal of the "Vytina" on Plaintiff's bill of lading is plainly different from that of the actual master and ship's seal.

2. Plaintiff's documents showed that the "Vytina" loaded the cargo of oil on February 25 and February 26 and that the bill of lading was executed by the master on February 26; whereas, the vessel actually left Nigeria on February 24.

3. The Plaintiff failed to offer any documentation evidencing charter of the "Vytina" of financing for the purchase of oil with a market value in excess of $16,000,000.

4. The Plaintiff had been advised by the International Chamber of Commerce investigator that his documents were forgeries prior to the filing of the complaint and arresting of the vessel.

This finding of facts is clearly not consistent with the record. On March 17, 1989, the Captain was deposed. The Captain testified that the vessel started loading in Nigeria on February 20, 1989 and completed loading on February 24, 1989. Between December 14,, 1988 and February 20, 1989, the vessel had changed registry from Greece to Cypress. The Captain did not know of Defendant Addax nor had he had any communication with Addax before the vessel went to Nigeria, during its stay in Nigeria, or before the vessel left Nigeria. [J.Appx. 279a-280a]

Although the vessel left Nigeria on February 24, 1989, the Captain did not get instructions to change course towards the Gulf Coast to Marcus Hook, Philadelphia. When the vessel left Nigeria on February 24, 1989, the Captain did not know that the vessel was headed for Philadelphia.

Although the Captain testified that he signed the bill of lading on February 24, 1989, the destination of the vessel was the U.S. Gulf. Although the name of the master and seal of the vessel on the bill of lading in possession of the Captain differs from that in possession of the Plaintiff, Appellant was not privy to this information on March 11, 1989, when the Complaint was filed. Furthermore, with a change of the registry of the vessel on February 20, 1989, it is not unusual and is, in fact, logical that the name of the master and seal of the vessel should change after February 24, 1989.

Similarly, Appellant had no opportunity to compare the bills of lading on March 11, 1989, since the copies in possession of the Captain were still on the high seas. The fact that the vessel left Nigeria on February 24, 1989, is immaterial since the Captain's instructions were to head towards Cape Palmos to await instructions for the vessel's destination. Cape Palmos is what is known as a deviation point and it is generally customary for vessels to head towards this point with their cargo before receiving destination instructions. Again, Appellant could not have noticed any differences between the Captain's bill of lading and that of the Plaintiff on March 11, 1989.

The lower court also concluded that the Plaintiff failed to offer any documentation evidencing charter of the "Vytina" of financing of the purchase. The "Vytina" was chartered by Gulf Agency and Shipping according to Plaintiff's documents [J.Appx. 29a] and reassigned to the Plaintiff. The Plaintiff was in Nigeria in person and made the necessary financial arrangements with the charterer and the NNPC. Appellant had no reason to question of dispute the Plaintiff's assertion. Gulf Agency and Shipping, Ltd. is well-known and Appellant had no reason to doubt its financial capacity to charter the vessel in question. Moreover, a charter party agreement is not a prerequisite to establishing claim to title of cargo.

The conclusion by the lower court that the Plaintiff had been advised by the International Chamber of Commerce investigator that his documents were forgeries prior to the filing of the Complaint and the arrest of the vessel, assumes that the Plaintiff communicated this information to counsel. On the contrary, this information was never communicated to the Appellant at any time prior to the filing of the Complaint and arrest of the vessel. Similarly, Appellant had no knowledge prior to March 16,1989, or five days after the filing of the Complaint that the Plaintiff had been involved in a similar oil transaction.

In light of these facts, it was error for the court to conclude that Appellent's pre-filing inquiry was "woefully inadequate." (See the statement of facts in the brief of Appellants CTC and L.O. Aham, Esquire, for a detailed description of the pre-filing investigation). As an attorney, Appellant examined, analyzed, and made a professional decision based on the best facts available on March 11, 1989. The naming of the NNPC and all other defendants, and the various theories of liability alleged were all supported by factual evidence. Any failure on the part of the Plaintiff to reveal any material fact, if any, to counsel, goes to Plaintiff's own personal credibility and not to the reasonableness of counsel's conduct. Certainly, any withholding of material fact by Plaintiff from counsel cannot be grounds for the imposition of Rule 11 sanctions against the attorney.

3. The referral of this case by Mr. Aham

The conditions under which this case was referred to Appellant have already been discussed in detailed in the Statement of Facts. As indicated earlier, Mr. Aham is a member of this bar and Appellant has no reason to question his professional integrity. Given the exhaustive pre-referral investigation conducted by Mr. Aham, Plaintiff's documents, it was reasonable to arrive at the legal conclusions made by the Appellant. In fact, in certain circumstances reliance alone on the forwarding counsel may satisfy the duty of reasonable inquiry. See, *Unioil, Inc. vs. E.F. Hutton Co.*, 802 F.2d 1080 (9th Cir. 1986). This reliance is essential especially when the surrounding circumstances makes time of the essence.

4. The Plausibility of the Legal Position Advocated

After verification of the Plaintiff's document with the characteristics of the vessel, its location and cargo, Appellant conducted an analysis of the facts. That analysis led the Appellant to the conclusion that the cargo aboard the "Vytina" was consigned to Plaintiff and that the cargo had been diverted by either one or all of the Defendants to Marcus Hook, Pennsylvania. This conclusion was based on the contents of Plaintiff's documents and the presence of the "Vytina" in Philadelphia when it was scheduled to arrive at the United States Gulf Coast on March 10, 1989. None of the Defendants had produced any documents to justify claim to the cargo of the "Vytina" on March 11, 1989 or any time thereafter.

Appellant also concluded that at the very least, Plaintiff was a co-owner of the cargo aboard the "Vytina". This conclusion was based on the fact that the vessel was headed for Philadelphia instead of the Gulf coast. Obviously, someone had directed the vessel to change destination and that someone may have knowledge about any claim to title of the cargo. In the alternative, Appellant concluded that Plaintiff may have been the victim of fraud by the NNPC. In that event, NNPC would be in a better position to reveal the rightful owner of the cargo aboard the "Vytina".

Since the Plaintiff had presented documents which on their face and inquiry appeared to be genuine, the cargo aboard the "Vytina" was rightfully the Plaintiff's until and unless someone else produced documents to the contrary. Under Federal Rules of Evidence, Rule 902(7) trade inscriptions or labels purporting to have been affixed in the course of business and indicating ownership, control or origin, are presumptively self-authenticating. Likewise, under Rule 902(9), Commercial paper and related documents, with signatures thereon; they are self-authenticating to the extent provided by general commercial law.

Absent any prior notice of fraud, and in the absence of any convincing evidence to the contrary, Appellant was convinced that the right to title to the cargo aboard the "Vytina" belonged to the Plaintiff. Even if it could be argued that the cargo was sold to more than one party, both of whom had equally authentic documents, the best approach to safeguarding the Plaintiff's interests was to obtain physical possession of the cargo in dispute before the "Vytina" completes the unloading process. At the very least, Plaintiff would have a cause of action under the equitable principle of fraudulent conveyence.

C. The lower court abused its discretion in ruling that Appellant and Plaintiff were jointly and severally liable for the Rule 11 sanctions imposed.

1. The record does not support the inference necessary to impose sanctions severally and jointly against the Appellant.

The facts and surrounding circumstances of this case have been stated at length and it is clear that they do not justify the imposition of Rule 11 sanctions against the Appellant. One of the most disturbing aspects of the lower court's decision is the conclusion that both Plaintiff and Appellant were jointly and severally liable for these sanctions. In so doing, the lower court has by inference created the appearance that Appellant was a part of a scheme with the Plaintiff to defraud the Defendants. In effect, the lower court converted the filing of the pleading by an attorney into a cause of action by that attorney against the Defendants. To arrive at this result, the lower court must have necessarily imputed knowledge of any material facts which were not revealed to counsel by the Plaintiff.

The ruling exacts punishment where none is due and the record clearly does not support any such inference.

The stigma associated with the imposition of Rule 11 sanctions compels that such sanctions must not be levied arbitrarily.

As the advisory committee has admonished, the administration of Rule 11 sanctions must not be used as "to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." To this date, Appellant has yet to see any authentic documents that make any of the Defendants, rather than the Plaintiff, the rightful owner of the cargo aboard the "Vytina". Even if the Plaintiff's documents prove to be fraudulent after comparison with the Defendants' documents, there is no way the Appellant could have known about this discrepancy at the time the pleadings were filed unless advised by the Plaintiff. There is nothing either in the record or otherwise that remotely justifies the ruling of the lower court.

2. *The imposition of Rule 11 sanctions jointly and severally against the Appellant and Plaintiff without a hearing violate the Appellant's Due Process rights.*

The lower court should not have imposed such severe sanctions against the Appellant without an opportunity to be heard. Appellant contends that his answer to Defendants' motion for sanctions alone did not constitute opportunity to be heard. No matter the defering interpretation of the parties of the facts of this case, sanctions imply punishment. To punish an attorney whose pre-filing factual and legal inquiry was more than objectionably reasonable without granting him the opportunity to be heard is clearly a violation of due process.

The Advisory Committee note states:

> A party seeking sanctions should give notice to the court and the offending party promptly upon

> discovering a basis for doing so. The time when sanctions are to be imposed rests in the discretion of the trial judge . . . The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances and the severity of the sanction under consideration.

Considering that sanctions of this nature carry a stigma and in this particular case a significant monetary expenditure, their imposition requires prior notice and opportunity to be heard. This is the intent of the decisions of this court. See, *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 570 (3rd Cir. 1985) (en banc); *Gargliardi v. McWilliams*, 834 F.2d 81, 83 (3rd Cir. 1987).

Therefore, it was clear error for the lower court to have imposed such severe sanctions without giving the Appellant the opportunity to be heard. In fact, if the Plaintiff, Mr. Aham, and the Appellant had been interrogated by the lower court, the Appellant's role would have become apparent and visciate any doubts that the Appellant did not violate Rule 11.

In conclusion, Appellant respectfully submits that given the emergency circumstances of the case, the factual and legal arguments available at the time of the filing of the Complaint on March 11, 1989, the District Court clearly erred and abused its discretion in ruling that Appellant, Simon W. Tache's pre-filing inquiry violated Rule 11 of F.R.C.P. The lower court also erred and abused its discretion in imposing sanctions against the Appellant and Plaintiff jointly and severally without an opportunity to be heard and contrary to the record.

CONCLUSION

For the reasons stated herein, the decision of the lower court imposing Rule 11 sanctions upon the Appellant should be reversed and vacated.

Respectfully submitted,
SIMON W. TACHE, P.C.

By: /s/Simon W. Tache
SIMON W. TACHE, ESQUIRE
Appellant

APPENDIX S

ORDER OF DISTRICT COURT MOLDING JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

(Judge Bechtle)
89-CIV-1815

CTC IMPORTS AND EXPORTS

V.

NIGERIAN PETROLEUM CORPORATION, et al.

ORDER

Judgement is hereby entered against CTC Imports and L. Obioma Aham, Esquire and in favor of Sohio Supply Company, Addax Overseas, S.A., Palime Navigation Co., and Rice Unruh pursuant to the following schedule:

DEFENDANT	CTC	MR. AHAM
Sohio	$ 41,000.93	$ 31,866.43
Addax	$ 78,877.96	$ 75,361.07
Palime	$ 44,689.23	$ 27,264.56
Rice Unruh	$ 2,610.00	$ 2,562.00
	$167,178.12	$137,054.06

Plaintiff CTC Imports and Exports and Mr. Aham are jointly and severely liable up to the amount of Mr. Aham's total liability of $137,054.06 and CTC is solely liable for that amount in excess of $137,054.06 up to and including $167,178.12.

/s/ Louis Bechtle
Louis Bechtle C.J.